No. 97-623 OCT - 6 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DEKALB COUNTY SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LINDA SCHRENKO, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do school board members, students, parents or taxpayers of a public school system, or the school system itself, have standing under Title VI of the Civil Rights Act of 1964 to challenge racial discrimination in the method used by state school officials to calculate the school system's share of state transportation funds? And, more particularly, does the fact that the local school system uses local funds to make up for the State funds (found by the lower courts to have been withheld for a racially discriminatory purpose) deprive the would-be challengers of an injury sufficient to support standing?

2. Does a suit to enjoin State officials from continuing to calculate student transportation funds in a racially discriminatory manner fit within the prospective injunction exception to Eleventh Amendment immunity recognized in *Ex parte Young*?

LIST OF PARTIES

Petitioners are:

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William Bradley Bryant
Christina Nicole Davis
Ralph Buck Davis, Jr.
Margaret T. Davis
DeKalb County Board of Education
DeKalb County School District
Frances Edwards
Lynn Cherry Grant
Mike Kelley
Maria Denise Lewis
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Phil McGregor
Terry Morris

Respondents are:

Edward B. Andrews
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Palmira Braswell
Brenda Fitzgerald
William R. Grow
Johnny Isakson
E. G. Meybohm
Steven N. McCoy
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State Board of Education for the State of Georgia
State Department of Education for the State of Georgia
State of Georgia
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The DeKalb County School District (the "District"), the members of the DeKalb County Board of Education and parents, students and taxpayers of DeKalb County, Georgia, hereby petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 109 F.3d 680 and is set out in the Appendix to this petition at pages 1a-26a. The Order of the Court of Appeals denying rehearing is reported at 120 F.3d 276 and is set out in the Appendix at pages 75a-76a. The Decision of the District Court is unreported and is set out in the Appendix at pages 38a-74a. The Final Judgment of the District Court is set out in the Appendix at page 28a.

JURISDICTION

The Opinion of the Court of Appeals was entered on April 7, 1997. Rehearing was denied on July 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV § 1.

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

Title VI of the Civil Rights Act of 1964 provides in relevant part that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

The Georgia statute governing state funding of student transportation provides in relevant part that:

> (d) Students who live beyond one and one-half miles from *the school to which they are assigned*, according to the nearest practical route by school bus, *shall be eligible to be counted as transported students* for

> the purpose of calculating that portion of the expense of student transportation associated with transporting students *from home to school and from school to home* as authorized under subsection (a) of this Code section, *provided such students are actually transported to such school* by school bus or other vehicle made available for this purpose by the local unit of administration. . . .

O.C.G.A. § 20-2-188(d) (emphasis added).

STATEMENT OF THE CASE

A. Background

The DeKalb County School District and the members of the DeKalb County Board of Education, together with parents, students and taxpayers of DeKalb County, Georgia, brought this case in 1990 to challenge (among other things) the racially discriminatory manner in which state education officials calculate the District's share of state funds for student transportation.

The DeKalb County School District, located in the metropolitan Atlanta area, is the largest school system in the State of Georgia. It serves nearly 80,000 students in more than 90 schools. The District formerly operated racially segregated schools but began desegregating in 1969. Upon remand from this Court's decision in *Freeman v. Pitts*, 503 U.S. 467 (1992), the District was declared unitary and was released from court supervision in 1996. *Mills v. Freeman*, 942 F. Supp. 1449 (N.D. Ga. 1996).

The District operates a majority-to-minority ("M-to-M") transfer program, which allows students to transfer voluntarily from a school in which their race is in the majority to a school in which their race is in the minority. The District also operates a number of magnet programs, which offer specialized educational programs organized around a specific theme or concept. Both programs originally were implemented to desegregate the District. Free transportation is an essential component of both programs.

The State of Georgia annually appropriates state funds to help local school systems defray the costs of student transportation. State funding for student transportation is governed by O.C.G.A. § 20-2-188, which provides a formula that is based, in part, on the mileage involved in transporting students to and from school. More specifically, the state law provides that students living more than one and one-half miles "from the school to which they are assigned . . . *shall* be eligible to be counted as transported students," provided they in fact ride the school bus to such school. O.C.G.A. § 20-2-188(d) (emphasis added).

The State Department of Education is responsible for calculating each school system's share of state transportation funds. For everyone except M-to-M and magnet students, the mileage calculation is based on the student's *actual* school assignment, in accordance with O.C.G.A. § 20-2-188.[1] However, the actual school assignments of M-to-M and magnet students are ignored and, instead, state education officials base their mileage calculations on the fiction that the M-to-M and magnet students attend the school in their attendance zone.

The effect of treating all M-to-M and magnet students as if they attend their neighborhood school is that the *actual* mileage involved in transporting these students to their assigned M-to-M or magnet schools is not considered—even though in almost all cases their assigned schools are significantly farther away from their homes than the school serving their attendance area. As a result, the District's share of state transportation funds is significantly diminished.

When this lawsuit was filed in 1990, the State Department's mileage calculations were governed by a policy

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[1] Aside from special programs like M-to-M and magnets, a student's school assignment ordinarily is determined by the geographic attendance zone in which he resides.

that had been adopted by the State Board of Education in 1972, when busing plans were beginning to be required in Georgia. The State Board policy, identified as ED(1)G, stated in relevant part:

> Pupil transportation funds shall be calculated on the basis of the school having available space in the pupil's grade level *nearest the pupil's place of residence.*

(emphasis added.) While this lawsuit was pending, the State Board rescinded ED(1)G and adopted a new rule, 160-5-3.10(2)(a). The new rule omitted the directive to base funding on the school "nearest the pupil's place of residence," as ED(1)G had. Nevertheless, state school officials continued to calculate state transportation funds for M-to-M and magnet students based on the fiction that these students attend the school serving their attendance area.

As a result of the State's use of fictional school assignments for M-to-M and magnet students, the State pays less than two percent of the costs of M-to-M and magnet transportation, as compared to approximately 34 percent of the District's other transportation costs.

B. District Court Decision

Petitioners sued the State Board of Education, the State Department of Education, state school officials and other state actors (the "State Defendants") under, *inter alia*, the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964 ("Title VI") (42 U.S.C. §§ 2000d *et seq.*), seeking monetary and injunctive relief on the ground that ED(1)G was adopted for the illegal and intentionally discriminatory purpose of discouraging school desegregation.

On September 23, 1994, the District Court issued an order holding that ED(1)G and the State's current treatment of M-to-M and magnet students in the computation of state transportation funds violated the Fourteenth Amendment, Title VI, and the Title VI regulations. *De-*

Kalb County Sch. Dist. v. Rogers, No. 90-1769, slip op. at 26-27 (N.D. Ga. 1994) (App. 38a). Noting that ED(1)G was adopted during a period of intense and vocal opposition to desegregation plans that involved busing, the District Court held that the State Board of Education's funding policy "creates a racial classification which violates the Fourteenth Amendment and Title VI." *Id.* at 24 (App. 58a). The District's findings included the following: [2]

> The historical background, the sequence of events leading to the adoption of policy ED(1)G, the likely detrimental impact of the policy on desegregative busing, and the state's considerable departure from its prior policies leads the court to find that the adoption of policy ED(1)G was prompted by a specific intent to discourage desegregative busing. . . . By ignoring the local district's actual M-to-M and magnet school assignments in computing transportation funding, while generally accepting the local district's school assignments in matters not relating to desegregation, the state treats M-to-M and magnet students differently from other students. This difference in treatment, which makes state transportation funds available when the purpose is to preserve segregated schools but denies state funds when the purpose is to promote desegregated schools, *discriminates on the basis of race.*

Id. at 26 (emphasis added) (App. 59a-60a).

Citing *Washington v. Seattle School District No. 1,* 458 U.S. 457 (1982), the District Court concluded that:

> The State's conscious decision to withhold funding for all but neighborhood school plans served to discourage the only effective means of desegregation in many school districts and discriminated against those school districts and students seeking to desegregate with the use of either mandatory or voluntary non-neighborhood school assignments.

Id. at 11-12. (App. 47a).

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[2] These findings were not disturbed on appeal.

The District Court found that the State Defendants' illegal conduct had deprived the DeKalb County School District of approximately $27.9 million since October 21, 1986 (the date on which Title VI was amended to expressly abrogate states' Eleventh Amendment immunity) and would continue to deprive the District of millions of additional dollars, unless enjoined. Accordingly, acting under the authority of Title VI, the District Court required the State Defendants to reimburse the District for the amounts wrongfully withheld and to stop using the discriminatory method of computing the District's transportation funds. *Id.* at 42 (74a).

C. Eleventh Circuit Decision

The Eleventh Circuit did not disturb the District Court's finding of racial discrimination in the administration of the state transportation funding program. Those findings remain in place. Nevertheless, the Court of Appeals held that the Petitioners lacked standing to seek either monetary or injunctive relief against the State Defendants because: (1) the only "legitimate interests" of the students and their parents already had been vindicated because the District was providing all of the desegregation measures required by the Constitution; (2) the local taxpayers did not have a sufficiently distinct injury to invoke the authority of the federal courts; and (3) a public school system cannot sue "its creator" under Title VI. *DeKalb County Sch. Dist. v. Schrenko*, 109 F.2d 680, 689 (11th Cir. 1997) (App. 17a-18a). The Court of Appeals also held that the Eleventh Amendment barred the grant of injunctive relief under the Fourteenth Amendment because the suit was really one for money, and, therefore, did not fit within the "prospective injunctive relief" exception recognized in *Ex parte Young*, 209 U.S. 123, 156 (1908). *Id.* at 691. (App. 21a).

The effect of the Court of Appeals' decision is that state officials continue to administer the state funding program in a racially discriminatory manner for racially discrimi-

natory reasons (facts found to be true by the District Court and not disturbed on appeal), and *no one* can challenge them in federal court—not the local government or its officials, not the patrons of the program, and not the local taxpayers who must make up the shortfall.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided two issues of fundamental and recurring importance concerning the authority of the federal courts to put an end to racial discrimination in state government programs. First, the Eleventh Circuit's holding that neither a public school system nor its officials, students, parents, or taxpayers have standing under Title VI to challenge purposeful discrimination in a state funding program serves to put state officials above the Constitution and laws of this nation and conflicts with decisions of the Fourth and Sixth Circuits. Second, the Eleventh Circuit's holding that the Eleventh Amendment barred the grant of prospective injunctive relief leaves state officials free to continue allocating state funds in a discriminatory manner and conflicts with this Court's decisions in *Ex parte Young,* 209 U.S. 123 (1908), *Papasan v. Allain,* 478 U.S. 265 (1986), and *Edelman v. Jordan,* 415 U.S. 651 (1974).

I. THE ELEVENTH CIRCUIT'S DECISION ON PETITIONERS' STANDING IS IN CONFLICT WITH OTHER CIRCUITS AND DECISIONS OF THIS COURT

A. Standing of Individual Petitioners

The Court of Appeals' holding that Petitioners did not have standing to sue under Title VI is in conflict with decisions of this Court and at least two other circuit courts of appeals. As for the standing of the students and their parents, the Eleventh Circuit concluded that their only "legitimate interests . . . are in an integrated educational system in DeKalb County which complies with the require-

ments of the Constitution"—interests which the court believed were vindicated in earlier desegregation litigation that ultimately resulted in a finding that the District had attained unitary status. 109 F.3d at 689. (App. 17a). The local taxpayers' stake in the case was dismissed in a footnote, which stated that "to sue in federal court, a plaintiff must allege an injury in fact distinct from that suffered by all or a large class of citizens." *Id.* at 689 n.19. (App. 18a).

To have standing under Article III of the Constitution, a plaintiff must allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines v. Byrd*, —— U.S. ——, 117 S.Ct. 2312, 2317 (1997).[3]

The individual Petitioners in the instant case meet the constitutional standing requirements. The State's discriminatory refusal to distribute over $27 million of transportation funds to the District has caused, and is causing, one or both of two distinct and palpable injuries to the individual student, parent, and taxpayer Petitioners in this case. First, the students and parents must go without teachers, programs, facilities and equipment that otherwise could have been funded by the money the District spent (and continues to spend) to cover the transportation costs the State is illegally refusing to pay. Second, the taxpayers paid and will pay higher local taxes because the District must pay transportation costs that the State otherwise would pay but for its discriminatory policy.

These injuries are direct and personal to the individual Petitioners and are not diminished by the mere fact that others in the District suffer similar injuries. *See Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 449-50 (1989) (holding that "[t]he fact that other citizens

[3] Because the individual plaintiffs sued under Title VI of the Civil Rights Act of 1964, the additional prudential standing considerations are inapplicable. *See* discussion at p. 11, *infra; Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972).

or groups of citizens might make the same complaint" as the plaintiffs did not lessen plaintiffs' injury or deny them standing). The District Court's judgment remedies these harms, first by restoring to the District transportation funds the State illegally withheld in the past and then by enjoining the State from continuing to illegally withhold these funds in the future. Therefore, the individual Petitioners have Article III standing to sue.

The Sixth Circuit reached this same conclusion under closely analogous facts in *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984). There, students and taxpayers of a school district brought Fourteenth Amendment challenges against the manner in which the Michigan Superintendent of Education allocated certain funds to their district. The Sixth Circuit squarely concluded that "[b]oth the district taxpayer and the district student are in positions to suffer direct and tangible injuries" from the state's refusal to properly allocate the funds to their district and, therefore, had standing to sue. *Id.* at 844. *Accord Northwestern School Dist. v. Pittenger*, 397 F. Supp. 975, 979-80 (W.D. Pa. 1975) (school district taxpayer had standing to challenge state officials' application of state statute governing distribution of subsidies to local districts); *see also Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984) (holding that residents of a town suffered a sufficiently distinct and palpable injury in the form of their town's lost revenues to have standing to challenge the formula by which the parish distributed sales taxes among the various parish communities).

The Eleventh Circuit's decision in this case directly conflicts with the holding in *Gwinn* because it summarily rejects as a basis for standing the individual Petitioners' interest, recognized in *Gwinn*, in challenging the State's illegal denial of funding to the District. It also conflicts with the Supreme Court's reasoning in *Doremus v. Board of Education*, 342 U.S. 429, 433-34 (1952), and *Mas-*

sachusetts v. Mellon, 262 U.S. 447, 486-87 (1926), that local taxpayers have a "direct and immediate" interest sufficient to confer upon them standing to challenge activities affecting local appropriations or causing losses of local revenue.

The Eleventh Circuit also denied the individual Petitioners standing under the prudential standing consideration that they failed to allege "an injury in fact distinct from that suffered by a large class of citizens." 109 F.3d at 689 n.19. (App. 18a). The Eleventh Circuit's reliance on prudential considerations to deny the individual Petitioners standing directly conflicts with *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), and *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971). The individual Petitioners assert claims under, *inter alia*, Title VI of the Civil Rights Act of 1964. *Trafficante* and *Hackett* both squarely hold that the Civil Rights Act of 1964 reflects "a congressional intention to define standing *as broadly as is permitted by Article III of the Constitution.*" *Trafficante*, 409 U.S. at 209 (emphasis added); *Hackett*, 445 F.2d at 446. Accordingly, judicially-created prudential standing considerations are inapplicable to Title VI claims, and the Eleventh Circuit's reliance on such considerations to deny the individual Petitioners standing was improper.

B. Standing of Local School District

In addition to the injury suffered by the individual Petitioners, the District also suffered an economic injury that likewise satisfies the standing requirement. In rejecting this economic injury as a basis for standing, the Eleventh Circuit came in direct conflict with a decision of the Fourth Circuit, *School Board of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987), which held that a local school board had standing to sue in federal court based on allegations that the state defendants' unconstitutional conduct had caused direct economic in-

jury to the local school board, requiring large expenditures for compensatory education and other educational services. *See also Board of Natural Resources v. Brown*, 992 F.2d 937, 942-43 (9th Cir. 1993) (holding that school boards have standing to assert equal protection claims under the Fifth Amendment); *see generally Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) (school district maintained equal protection claim against state board of education under the Fourteenth Amendment).[4]

II. THE ELEVENTH CIRCUIT'S ELEVENTH AMENDMENT DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT

Under the Eleventh Amendment, states are generally immune from suit in federal court. The immunity, however, is not absolute. Congress may abrogate the states' Eleventh Amendment immunity by enacting legislation pursuant to the enforcement provisions of section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Eleventh Amendment immunity is not a defense to a Title VI action because Congress expressly abrogated that immunity for violations occurring in whole or in part after October 21, 1986. 42 U.S.C. § 2000d-7. Had the Court of Appeals correctly decided that the Petitioners had standing under Title VI, the Eleventh Amendment would not have barred either monetary or injunctive relief.

Even without Title VI, however, Petitioners are entitled to an injunction requiring state education officials to stop

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[4] Other cases holding that local school districts have standing to sue state defendants to eliminate discrimination include *Little Rock School Dist. v. Pulaski County Special School Dist.*, 584 F. Supp. 328, 352 (E.D. Ark. 1984); *Board of School Directors of Milwaukee v. State of Wisconsin*, 649 F. Supp. 82 (E.D. Wis. 1985). *See also Board of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968) (local school board assumed to have standing to challenge constitutional validity of state statute); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039 (1980) (White, J., dissenting from denial of certiorari).

using a funding method that the District Court held violated the Fourteenth Amendment as well as Title VI. Suits of this sort are specifically authorized under a long line of cases extending back to *Ex parte Young*, 209 U.S. 123 (1908). In that case, this Court carved out an important exception to Eleventh Amendment immunity by holding that a suit to enjoin the unconstitutional acts of a state official is not a suit against the State and therefore is not barred by the Eleventh Amendment. 209 U.S. at 159-60. This holding was based on the theory that an unconstitutional statute is void and, therefore, does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Id.* at 160.

In repeatedly reaffirming *Young*'s prospective compliance exception, this Court has firmly established that the Eleventh Amendment does not prevent federal courts from entertaining suits that seek prospective injunctive relief against state officials who are sued in their official capacities to prevent a continuing violation of federal law. *E.g., Papasan v. Allain*, 478 U.S. 265, 282 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Milliken v. Bradley*, 433 U.S. 267 (1977). Indeed, this Court has recognized that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green*, 474 U.S. at 68 (citation omitted).

Moreover, "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment *even though accompanied by a substantial ancillary effect on the state treasury*." *Papasan*, 478 U.S. at 278 (emphasis added). Thus, in *Edelman v. Jordan*, 415 U.S. 651, 667 (1974), the Court observed that the injunction issued in *Young* had a serious fiscal impact on the State because it prevented the collection of substantial monetary penalties that otherwise would have enriched the State treasury. The *Edelman* Court also

noted that other cases have allowed an even greater impact on state treasuries:

> But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with orders which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young.*

Id. at 667-68 (emphasis added).

Furthermore, the Supreme Court expressly has held that relief identical to that sought here fits within the prospective compliance exception to the Eleventh Amendment. In *Papasan v. Allain*, 478 U.S. 265 (1986), a case addressing a disparity in the distribution of educational funds in the State of Mississippi growing out of actions that occurred a century earlier, this Court held that the alleged constitutional violation—the State's unequal distribution of benefits—was precisely the type of continuing violation for which a remedy could be fashioned under *Ex parte Young*. The Court stated that:

> [T]he essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State. A remedy to eliminate this current disparity, *even a remedy that might require the expenditure of State funds*, would ensure " 'compliance in the future with a substantive federal-question determination' " rather than bestow an award for accrued monetary liability. This claim is, in fact, in all essential respects the same as the equal protection claim for which relief was approved in *Milliken*.

478 U.S. at 283.

Instead of following the *Ex parte Young* line of cases, the Eleventh Circuit held that the District's attainment of unitary status meant that all violations had been remedied, leaving nothing to be enjoined. However, the District's attainment of unitary status is irrelevant to this case. The State Defendants continue to discriminate in the allocation of state transportation funds to the District. That is a separate and ongoing violation, totally unrelated to the status of desegregation in DeKalb schools. Enjoining this violation may mean that the State Defendants have to allocate more transportation funds to the District, but any such financial impact is merely "ancillary" to the injunction, just as in *Papasan* and *Edelman*.

Moreover, this is not a case, as in *Kelley v. Metropolitan County Board of Education*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), where a federal court is asked to rewrite state law or change the manner in which the state allocates its education funds. In the instant case, the relief sought is completely consistent with the state statute that governs state funding of pupil transportation. All that state education officials have to do is apply the state law in a nondiscriminatory manner. *See generally Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 476-77 (1982) ("the issue here, after all, is not whether Washington has authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause"). Therefore, federalism concerns are not valid considerations.

The District Court's prospective injunctive relief ends the State's intentionally discriminatory practice of not funding M-to-M and magnet student transportation in the District. This relief falls squarely within the *Young* exception to the State's Eleventh Amendment immunity, and any ancillary effect this injunction has on the State treasury does not change this. Therefore, the Eleventh Circuit's decision is contrary to this Court's decision and is in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 95-9149

DEKALB COUNTY SCHOOL DISTRICT, on its own behalf and on behalf of the children in the DeKalb County School District; NORMA BERGMAN; MIKE KELLY; TERRY MORRIS; ELIZABETH ANDREWS; LYMAN D. HOWARD; PHIL MCGREGOR, *et al.*,

Plaintiffs-Appellees,
Cross-Appellants,

v.

LINDA SCHRENKO, in her official capacity as Superintendent of Schools for the State of Georgia; STATE BOARD OF EDUCATION FOR THE STATE OF GEORGIA; WILLOU SMITH; WILLIAM R. GROW; EDWARD B. ANDREWS; the DEPARTMENT OF EDUCATION FOR THE STATE OF GEORGIA; the STATE OF GEORGIA; ZELL MILLER, in his official capacity as Governor of the State of Georgia; JOHN OXENDINE, in his official capacity as Comptroller General of the State of Georgia; STEVEN N. MCCOY, in his official capacity as Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia; LARRY D. THOMPSON; JOHNNY ISAKSON; BRENDA FITZGERALD; PALMIRA BRASWELL; PHILLIP A. WILHEIT, SR.; E.G. MEYPOHM; BARBARA ARCHIBALD,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

April 7, 1997

Before ANDERSON, Circuit Judge, and KRAVITCH and HENDERSON, Senior Circuit Judges.

PER CURIAM:

The DeKalb County School District, the members of the DeKalb County Board of Education, and several individuals brought this action against the State of Georgia and its Governor, the State Department of Education, the State Board of Education and its members, the State School Superintendent, and several other state officials to recover transportation and program costs incurred by the plaintiffs because of the desegregation litigation involving the DeKalb County School District's former dual public school system. The United States District Court for the Northern District of Georgia awarded the plaintiffs the desegregative transportation costs they sought and ordered the State of Georgia to fund those future transportation expenses. The district court disallowed, however, the plaintiffs' recovery of the costs of their "majority to minority" transfer [1] and magnet school desegregation programs. The state defendants appeal the district court's adverse ruling on the transportation issue, and the DeKalb County plaintiffs filed a cross-appeal to the district court's rejection of their claim for their programmatic costs. For the reasons stated in this opinion, we reverse the district court's judgment granting transportation costs to the plaintiffs and affirm its ruling in favor of the defendants denying the plaintiffs' recovery of their costs incurred in the other desegregation undertakings.

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[1] Under the "majority to minority" transfer program, a student could transfer from a school where his race constituted a majority of the student population to a school where his race was in the minority. This program was started by the DCSS on it own initiative in 1972, but was ordered expanded by the district court in 1976.

I. BACKGROUND OF THIS APPEAL

A. *The Desegregation Litigation.*

DeKalb County, Georgia, is a suburban area adjacent to and east of Atlanta.[2] The DeKalb County Board of Education ("DCBE") operates the DeKalb County School System ("DCSS"), the schools within the DeKalb County School District, which, at all times relevant to this case, was the largest school district in the State of Georgia. Consistent with state law and its own policies and those promulgated by the State Board of Education and the State Department of Education, the DCSS historically operated a segregated, dual system of education with separate schools for black and white students. In 1954, the Supreme Court of the United States declared segregated schools unconstitutional in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and the following year ordered all such segregated school districts to desegregate with "all deliberate speed," *Brown v. Board of Education,* 349 U.S. 294, 301, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955). Those rulings notwithstanding, the DCSS did not commence its desegregation efforts until 1966 when it implemented a "freedom of choice" plan pursuant to which some black students attended formerly *de jure* white schools.[3]

In 1968, the Supreme Court decided *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), in which the Court held that, if freedom of choice plans failed to adequately end the unlawful segre-

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[2] A small part of the City of Atlanta extends into DeKalb County. That area of DeKalb County is part of the City of Atlanta School System. Similarly, the City of Decatur, located in the central part of DeKalb County, operates an independent municipal school system. The areas within the corporate limits of those two cities are not part of the DeKalb County School System and are not affected by this action.

[3] Additionally, in 1968, the DCBE closed Bruce Street High School, one of two all-black high schools.

gation of a school district, other means must be utilized to achieve that purpose. Within two months, a class of black students filed suit against the DCSS. In June, 1969, the United States District Court for the Northern District of Georgia entered an order which abolished the freedom of choice plan and enjoined the DCSS from further discrimination on the basis of race. The court ordered the DCSS to close all remaining *de jure* black schools and to establish a neighborhood school attendance policy. The court retained jurisdiction to ensure compliance with its order. *See Pitts v. Cherry,* C.A. No. 11946 (N.D.Ga. June 12, 1969).

The parties did not seek any modification of the 1969 order or request additional relief until 1975 when the plaintiffs complained that DCSS had violated the earlier plan. In 1976, the district court ordered the DCSS to expand its "majority to minority" ("M to M") transfer system of assignment, pursuant to which a student could transfer from any school in which his or her race was in the majority to a school in which that race was in the minority, by providing free transportation to the students, and to reassign faculty and staff members so that the racial percentages at each school would approximate those in the system at large. In the late 1970's, the district court considered several plan modifications, not relevant to this litigation, requested by the DCSS.

In 1983, the plaintiffs sought additional relief in the district court.[4] In an order entered following a hearing on the plaintiffs' request, the district court, apparently relying on its 1969 order in the case, asserted that the DCSS had been converted from a dual to a unitary school system in that year. The plaintiffs appealed to this court,

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[4] The plaintiffs contended that the limitation on M to M transfers to predominantly white Lakeside High School and the proposed expansion of Redan High School would have the effect of perpetuating segregation in the system. The district court ordered the DCSS to accept additional black students in the M to M program at Lakeside but declined to enjoin the expansion of Redan.

which held that the district court had improperly declared the DCSS to be unitary without notifying the plaintiffs and conducting a hearing on that issue. *Pitts v. Freeman*, 755 F.2d 1423 (11th Cir.1985).

In January 1986, the DCSS filed a motion seeking final dismissal of the case, and the district court conducted a three-week bench trial in July, 1987 to determine whether the system had indeed achieved unitary status. In an order entered June 30, 1988, the district court denied the DCSS's motion, concluding that vestiges of the dual system remained in staff assignments, resource allocation and quality of education. The court found, however, that the system had become unitary with regard to student assignments, transportation, physical facilities and extracurricular activities. Accordingly, the court decided that no further relief was necessary in those areas. The district court certified its order for immediate appeal pursuant to 28 U.S.C. § 1292(b), and both sides sought review in this court.[5]

The appellate panel affirmed the district court's judgment that the DCSS had not fulfilled its responsibilities with respect to faculty and staff assignments but reversed its finding that the DCSS had met its obligations in the assignment of students. The court also held that a school system could not be declared unitary until it had maintained racial equality for a period of three years in all of the categories identified by the Supreme Court in *Green*.[6] The court, therefore, determined that the DCSS was not being operated as a unitary system. *Pitts v. Freeman*, 887 F.2d 1438, 1450 (11th Cir.1989).

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[5] The plaintiffs did not seek review of the district court's ruling with respect to the areas of transportation, extracurricular activities and facilities. Consequently, the appellate court observed that those issues were not before it.

[6] Under *Green*, the factors to be considered in determining whether a school system has achieved unitary status are student assignment, faculty, staff, transportation, extracurricular activities and facilities. *Green*, 391 U.S. at 435, 88 S.Ct. at 1692.

The DCSS petitioned the Supreme Court for review. In 1992, the Supreme Court reversed this court, holding that a district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan. *See Freeman v. Pitts,* 503 U.S. 467, 471, 112 S.Ct. 1430, 1436, 118 L.Ed.2d 108 (1992). According to the Court, "in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations." *Id.* at 490, 112 S.Ct. at 1445.[7]

With respect to the case before it, the Court held "the Court of Appeals did err in holding that, as a matter of law, the District Court had no discretion to permit DCSS to regain control over student assignment, transportation, physical facilities, and extracurricular activities, while retaining court supervision over the areas of faculty and administrative assignments and the quality of education, where full compliance had not been demonstrated." *Id.* at 492, 112 S.Ct. at 1446. Turning to the question whether continuing judicial control over student attendance was necessary to achieve compliance in other areas of the system's operations, the Court noted that the district court, not having its analysis before it, did not have the opportunity to make specific findings and conclusions on this aspect of the case and stated that "[f]urther proceedings are appropriate for this purpose." *Id.* at 498, 112 S.Ct. at 1449.

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[7] The Court noted that the racial composition of the student population of the DCSS had changed dramatically over the years. When the district court first ordered desegregation of the system, only 5.6% of the student population was black; by 1986, the percentage of black students had reached 47%. *Freeman v. Pitts*, 503 U.S. at 475, 112 S.Ct. at 1438. Evidence subsequently introduced in this litigation showed that by the 1992-93 school year, black students made up 66% of the district's student enrollment. (District court order entered September 23, 1994, at 2).

Complying with the Supreme Court's mandate, this court remanded the case to the district court with the following instructions:

> The issues to be considered by the district court should include, but not necessarily be limited to, faculty and staff assignments (which may or may not involve a re-examination of student assignments), resource allocation, the quality of education being received by all students and the good faith commitment of the school district.

Pitts v. Freeman, 979 F.2d 1472, 1473 (11th Cir.1992) (*per curiam*).

The district court subsequently entered orders directing the parties to address whether the DCSS had become unitary with respect to faculty assignments and resource allocation, whether the system had demonstrated good faith in complying with the desegregation order and whether it was providing a quality of education consistent with the letter and spirit of the decree. The court held hearings on these issues in January and March, 1996. In an order entered June 12, 1996, the district court stated that it would "not revisit those . . . factors in which a unitary system has already been held to exist. Rather, the court will address only those issues left open by the 1988 Order, and the appellate and Supreme Court review of that order." *Mills v. Freeman,* 942 F.Supp. 1449, 1454 (N.D.Ga.1996). Thus, the court considered on the merits only the issues of faculty assignments, quality of education, and the DCSS's good faith.[8] The court concluded that the DCSS had achieved unitary status in all respects and granted its motion for final dismissal of the case. *Id.* at 1463-64. No appeal has been taken from that order.

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[8] Given the Supreme Court's opinion in the case and this court's order remanding the case to the district court, the district court could have reexamined the area of student assignments, but the court apparently elected to treat that question as settled by its 1988 order.

B. *History of this Litigation.*

This lawsuit was filed in 1990 by the DeKalb County School District, the members of the DeKalb County Board of Education, and several parents and students (hereinafter collectively "DeKalb") against the State of Georgia, the Governor, the State Board of Education and its members, the State Superintendent of Schools, the State Department of Education and several other state officials (collectively the "State") seeking to recover its past transportation and other expenses related to its desegregation efforts. In addition, as stated earlier, DeKalb sought injunctive relief requiring the State to help fund its future desegregaton expenses. It contended that the State's efforts to impede integration violated the Fourteenth Amendment of the United States Constitution; the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701-1758, which, *inter alia,* bars a state education agency from segregating students on the basis of race, color or national origin and requires an agency which has practiced such segregation to take affirmative steps to remove the vestiges of a dual school system; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which prohibits discriminations on the basis of race in any governmental program that is the recipient of federal funds; and certain provisions of state law.

The case was tried to the court in July 1993. The evidence at trial disclosed that the State funds a portion of each local school district's educational expenditures depending on a number of factors including, since 1985, the wealth of the local district. The State partially reimburses local districts for their transportation expenses based on a formula in use since the early 1960's. Every three years, using maps supplied by the local districts plotting the location of students residing more than 1 and ½ miles from their assigned or neighborhood school, state officials draw "ideal" bus routes which will collect those students and deliver them most efficiently to that school. They then calculate the number of route miles and buses

needed to transport those students using these ideal routes and determine the amount each district will be allocated for transportation expenses. These calculations are made without regard to the actual schools to which any of the students are assigned or to the local district's actual bus routes or transportation expenses. Consequently, the State does not compensate DeKalb, or any other local district in the state, for the additional expense incurred in transporting the students in its magnet school and M to M transfer programs, who frequently reside long distances from the schools which they attend.[9]

The district court entered its findings of fact and conclusions of law in an order dated September 23, 1994. The court observed that the State had vigorously resisted the integration of its public schools and had adopted a number of statutes and policies over the years in an effort to preserve segregated schools. The court noted that in the 1960's the State had refused to fund transportation for students outside their local attendance zone except for white students seeking to attend white schools under freedom-of-choice plans. (Order at 6-7).[10] When compulsory busing began to be used to desegregate schools, the State Department of Education adopted in 1972

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[9] The district court observed that 6,251 students who participated in the M to M transfer and magnet school programs were transported by the DCSS in fiscal year 1992. (Order entered September 23, 1994, at 12-13).

[10] In support of this statement, the district court cited the 1968 deposition of John C. Maddox, Chief of Pupil Transportation Services for the State Board of Education, taken in *United States v. Board of Education of Johnson County, Georgia*, C.A. No. 696, in the Southern District of Georgia. The testimony Maddox actually gave in his deposition, however, does not appear to support the district court's assertion. In fact, in response to a hypothetical question posed by one of the attorneys, Maddox stated that the state would fund the transportation of a black student who was assigned by a local school board to a formerly all-white school as part of a freedom-of-choice desegration plan. *See* Maddox Dep. at 108-09, Plaintiffs' Exh. 302.

Policy ED(1)G, which provided that student transportation funds were to be calculated using the school nearest the student's residence having space in the appropriate grade.[11] The court found that this policy was adopted to discourage desegregative student transfers. (*Id.* at 11-12).[12] In 1990, DeKalb requested that the State fund the additional transportation expenses required by its magnet and M to M transfer programs. The State refused, citing Policy ED(1)G and other policies. The district court found that Policy ED(1)G was repealed in 1991. It apparently was replaced by a similar provision, a rule adopted by the State Board of Education in November 1990.[13]

The district court concluded that the State's system of calculating reimbursable transportation expenses is not consistent with O.C.G.A. § 20-2-188(d), which directs

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[11] The policy provided the following:

> Pupil transportation funds shall be calculated on the basis of the school having available space in the pupil's grade level nearest the pupil's place of residence.

State Board of Education Policy ED(1)G.

[12] The district court reached this conclusion notwithstanding testimony from Samuel P. McCullough, Jr., Director of Pupil Transportation for the State Board of Education. In his deposition, taken in the parallel litigation brought on behalf of the Savannah/Chatham County school system, McCullough testified that, in the time period from 1976 to 1986, the State funded bus transportation for students bused to paired schools in noncontiguous attendance zones for desegration purposes. *See* McCullough Dep. at 95-96.

[13] The new policy stated in relevant part:

> (i) Routing shall be as uniform as practical. Routing shall be planned and operated with minimum bus mileage. Unnecessary travel by empty buses, excessive bus stops, and excess spur routs off the trunk lines shall be eliminated. . . .
>
> (v) Students living within one and one-half miles of school shall not be included in the survey for state allotment purposes.

State Board of Education Rule 160-5-3-10(2)(a)(1). *See* Plaintiffs' Exhs. No. 75 & 77.

in part that students "who live beyond one and one-half miles from the school to which they are assigned . . . shall be eligible to be counted as transported students. . . ." From this, the court held that the State's transportation funding policy violates this provision of state law, the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The court found, however, that the State had not violated the Equal Educational Opportunity Act. (*Id.* at 20-28). Using figures supplied by DeKalb [14] and not disputed by the State, the court held that DeKalb was due $24,632,351 in transportation monies that should have been paid pursuant to state law." (*Id.* at 43). The court enjoined the State from ignoring magnet and M to M transfer students in its future calculation of transportation funding and ordered the State to base its computation on each student's actual school assignment. (*Id.* at 23).

Turning to DeKalb's request for reimbursement for its magnet school and M to M programs, the district court found that, under Georgia law, DeKalb was primarily responsible for the operation of its public schools and, therefore, for remedying the effects of its earlier dual school system. The court noted that there was "no evidence . . . to suggest that DeKalb's M to M or magnet programs were ever hindered or interfered with by the state or state officials in their initial voluntary form or in their judicially modified form." (Order at 19). The court observed that a three-judge panel had in an earlier lawsuit "found that no acts on the part of the state had

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[14] DeKalb submitted evidence that the transportation costs of its M to M transfer and magnet school programs for the fiscal years 1978 through 1992 was $34,726,764.00. According to the plaintiffs, if the State had construed O.C.G.A. § 20-2-188 as did they and the district court, the State would have paid the DCSS a total of $25,372,748.00 over that period rather than the $740,397.00 the State actually paid toward those costs. The district court arrived at the amount of its award by subtracting the latter figure from the former.

been shown to foster a segregative condition since approximately 1964." (*Id.* at 32, *citing Armour v. Nix*, No. 16708, at 7 & 27 (N.D.Ga. Sept. 24, 1979), *aff'd*, 446 U.S. 930, 100 S.Ct. 2146, 64 L.Ed.2d 784 (1980)). The court further observed that the Supreme Court had affirmed its finding that the DCSS was unitary with respect to transportation and three other of the six factors identified by the Court in *Green*. On this record, the court concluded that it could not "order the state to participate in a remedy for the removal of a vestige of the dual school system which the court has already declared removed." (*Id.* at 30).[15] Therefore, the court refused to order the State to compensate the DCSS for its programmatic desegregation expenses. The court distinguished cases cited by the plaintiffs where state governments had been ordered to pay for desegration efforts on the ground that those states had much greater responsibility for and authority over local schools. Moreover, the court found that, in those cases, the state or state agencies had been involved in the desegration litigation from the beginning. Here, in contrast, the DCSS had been under court supervision for over 20 years before filing this action against the state.

Both DeKalb and the State filed motions to alter or amend the judgment. In response to the State's motion, the district court clarified its order to specify that its award of damages to DeKalb was based on federal, not state, law, thereby avoiding the bar posed by the Eleventh Amendment to the Constitution. According to the court, it had used state law simply to measure the damages due DeKalb. The court reiterated, however, its finding that the State had not violated the Equal Educational Opportunities Act because "the transporta-

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[15] This conclusion seems to conflict with the court's decision to require the state to participate in a transportation remedy despite the earlier holding in the desegregation litigation that the DCSS was unitary with respect to transportation.

tion policy is *not* a vestige of the dual school system. . . ." (Order dated December 19, 1994, at 8) (emphasis in original). As a consequence of DeKalb's motion, the court awarded the plaintiffs an additional $9,259,257 in transportation expenses for the 1993 and 1994 fiscal years. These appeals followed.

II. STANDARD OF REVIEW

The district court's findings of fact may not be disturbed unless they are clearly erroneous. Fed.R.Civ.P. 52(a); *Robinson v. City of Fairfield*, 750 F.2d 1507, 1510 (11th Cir. 1985). Its conclusions of law are subject to de novo review by this court. *Veale v. Citibank, F.S.B.*, 85 F.3d 577, 579 (11th Cir. 1996).

III. DISCUSSION

A. *Defendants' Appeal.*

1. Retrospective Monetary Relief.

The State urges that the district court's monetary damages violate the Eleventh Amendment and settled principles of comity and federalism. It notes that the court's September 23, 1994, order repeatedly states that DeKalb is due compensation for the State's violation of O.C.G.A. § 20-2-188, a holding that is barred by the Eleventh Amendment. While conceding that the district court clarified its order by relying on the Fourteenth Amendment and Title VI rather than the state statute as the basis for its award, the State argues that it is, in substance, one for the violation of state law. It also insists that the district court's decision abridges the political integrity of the State by reallocating a tax burden between DeKalb County taxpayers and those who bear the tax burden in the state-at-large.

The State also maintains that Title VI does not support the award of damages in this case. While admitting that Congress has abrogated the State's Eleventh Amendment

immunity with respect to actions brought pursuant to Title VI, the defendants assert that this case is far from a legitimate Title VI action. It alleges that DeKalb County, as a subordinate creation of the state, lacks standing to bring this action against the State. Moreover, noting that this case is simply one for allocating a tax burden, not for substantive relief under the civil rights laws, the State claims that the individual plaintiffs here also lack standing to seek relief against the State.

The Eleventh Amendment to the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Over a century ago, the Supreme Court made clear that this language also barred suits against a state by its own citizens. *See Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). In short, the Eleventh Amendment constitutes an "absolute bar" to a state's being sued by its own citizens, among others. *See Monaco v. Mississippi*, 292 U.S. 313, 329, 54 S.Ct. 745, 750, 78 L.Ed. 1282 (1934). In the view of the Supreme Court, the principle of sovereign immunity embodied in the Eleventh Amendment is a broad, fundamental one, which is "among the most stable in our constitutional jurisprudence." *Welch v. State Department of Highways*, 483 U.S. 468, 486, 107 S.Ct. 2941, 2952, 97 L.Ed.2d 389 (1987). The doctrine plays a vital role in our federal system by preventing the sensitive problems which would result from compelling one sovereign to appear in the courts of the other against its will. *Id.* at 486-87, 107 S.Ct. at 2952.

For that reason, absent its consent, a state may not be sued in federal court unless Congress has clearly and unequivocally abrogated the state's Eleventh Amendment immunity by exercising its power with respect to rights

protected by the Fourteenth Amendment. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984). Of course, Congress may not nullify a state's immunity with respect to alleged violations of state law. For that reason, a federal court may not entertain a cause of action against a state for alleged violations of state law, even if that state claim is pendent to a federal claim which the district court could adjudicate. *Id.* at 117-23, 104 S.Ct. at 917-20. According to the Supreme Court, "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.* at 106, 104 S.Ct. at 911.

In this case, DeKalb invoked the jurisdiction of the district court by asserting that the State's conduct violated federal rights protected by the Fourteenth Amendment, Title VI and the Equal Educational Opportunities Act. As far as transportation funding is concerned, however, the gravamen of its complaint appears to be that the State has improperly interpreted and failed to adhere to a state statute governing reimbursement for transportation costs. As was noted earlier, the district court's order concluded that DeKalb was due additional "transportation monies that should have been paid pursuant to state law." It is uncontroverted that the damages awarded to DeKalb in this case was measured by application of the disputed Georgia statutory porvision, O.C.G.A. § 20-2-188(d). DeKalb's discussion of this issue in its brief before us is almost entirely devoted to state law. Looking at the substance of the district court's judgment, it appears to be one for violation of state law, a holding barred by

the Eleventh Amendment. *See Pennhurst*, 465 U.S. at 106, 104 S.Ct. at 911.

Replying to the State's post-judgment motion, the district court modified its initial decision to rest its judgment more clearly on its finding that the State had violated the Fourteenth Amendment and Title VI. Even if we assume that the district court's disposition is based on federal law, the judgment in favor of DeKalb must still overcome the Eleventh Amendment barrier. The Supreme Court has found no general abrogation of Eleventh Amendment immunity for claims brought pursuant to the Fourteenth Amendment. *See Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). On the other hand, the parties agree that Congress has abolished the states' immunity for causes of action grounded in Title VI. *See* 42 U.S.C. § 2000d-7.[16] Thus, the State could be forced to defend a Title VI action in federal court without its consent.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or actiivty receiving Federal financial assistance." 42 U.S.C. § 2000d.[17] While Title VI is not itself an independent source of federal funding, it bars discrimination in over 80 federal programs which provide financial assistance to state and local educational activities. *See* 34 C.F.R. Pt. 100, App. A.

In spite of this bar, it does not appear that any of the plaintiffs here have standing to sue the State for a viola-

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[16] The abrogation of immunity applies to violations that occur in whole or in part after October 21, 1986, the effective date of the Rehabilitation Act Amendments of 1986, Pub.L. 99-506. *See* 42 U.S.C. § 2000d-7(b).

[17] Pub.L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat 252.

tion of Title VI. First, it is now clearly the law in this circuit that a political subdivision of a state, such as the DeKalb County School District and its Board of Education, may not maintain a suit for a breach of Title VI against the State in federal court. In *U.S. v. Alabama,* 791 F.2d 1450, 1455-57 (11th Cir.1986), *cert. denied,* 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987), a panel of this court held that a state university lacked standing to sue the sovereign that created it under 42 U.S.C. § 1983 for a violation of the Fourteenth Amendment. Furthermore, the court concluded that a state university was not a "person" with rights under Title VI which could be vindicated in a lawsuit against the state. *Id.; see also Knight v. Alabama,* 14 F.3d 1534, 1554 (11th Cir.1994).

DeKalb counters that the plaintiffs can circumvent this obstacle because there are individual citizens who are plaintiffs in this case. The Supreme Court has recognized a private right of action for individuals injured by a Title VI violation. *See Cannon v. University of Chicago,* 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 560 (1979). Nonetheless, the individual plaintiffs here appear to be only nominally interested in the outcome of this action. The legitimate interests of those individuals are in an integrated educational system in DeKalb County which complies with the requirements of the Constitution, and their rights in those matters have been vindicated by the district court in the underlying desegregation action.[18] No discrete relief was sought in this action in favor of the individual plaintiffs, and none has been awarded for their benefit. Indeed, given that the DCSS is funding all the desegregation measures required by the Constitution, these individuals have suffered no

[18]The plaintiffs in the original desegregation litigation could, presumably, have joined the State and its educational agencies as defendants in that suit, but they did not do so. *See, e.g., Stanley v. Darlington County School District,* 84 F.3d 707, 717 (4th Cir. 1996).

injury at all which could be remedied by the invocation of Title VI.[19]

It must be emphasized that we are not being called upon to adjudicate the rights of minority students and parents to a quality, unified educational system in DeKalb County. As just noted, those rights have been vindicated in the desegregation lawsuit, and the district court has now declared the DCSS to be a unitary school system, a determination which is not on appeal. The plaintiffs in this action sought only a monetary award to compensate DeKalb for some of its past desegregative transportation and other program costs and an injunction to require the State to help fund those initiatives in the future. In other words, this case is simply about who will pay for the measures undertaken by DeKalb to remedy the effects of the past segregation of its public schools, the taxpayers of DeKalb County alone or the taxpayers of the state as a whole.

If DeKalb had sought this relief in the underlying desegregation suit, it would be more clearly revealed for what it is: a third-party claim for contribution by a political subdivision of a state against the sovereign that created

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[19] It might be argued that the individual plaintiffs have standing to challenge the State's educational funding practices, or failure to fund certain desegregation programs, because, as DeKalb County taxpayers, their local property taxes may be increased by the State's actions. Even so, in order to have standing to sue in federal court, a plaintiff must allege an injury in fact distinct from that suffered by all or a large class of citizens. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). Therefore, with respect to federal taxpayers, the Supreme Court has generally found they lack standing to contest government spending unless the challenge is to government expenditures which allegedly violate the Establishment Clause of the First Amendment. *See Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The same result has been reached when local taxpayers seek to invoke the authority of the federal courts. *See Warth*, 422 U.S. at 508-10, 95 S.Ct. at 2210-11.

it. Yet, a federal court's grant of relief in such an instance would be a serious violation of the most elementary notions of federalism and comity. A state's power to create, abolish and determine the level of public funding of political subdivisions has long been recognized as an element of state sovereignty. *See, e.g., City of Trenton v. State of New Jersey,* 262 U.S. 182, 186, 43 S.Ct. 534, 536, 67 L.Ed. 937 (1923). As the Fourth Circuit Court of Appeals observed in a similar case involving the funding of local school desegregation measures, "[i]t would be an unfathomable intrusion into a state's affairs—and a violation of the most basic notions of federalism—for a federal court to determine the allocation of a state's financial resources. The legislative debate over such allocation is uniquely an exercise of state sovereignty." *Stanley v. Darlington County School District,* 84 F.3d 707, 716 (4th Cir.1996); *see also Harris v. Angelina County, Texas,* 31 F.3d 331, 340 (5th Cir.1994) ("we can think of few greater intrusions on state sovereignty than requiring a state to respond, in federal court, to a claim for contribution brought by one of its own counties"), *Kelley v. Metropolitan County Board of Education of Nashville & Davidson County,* 836 F.2d 986, 998 (6th Cir.1987), *cert. denied,* 487 U.S. 1206, 108 S.Ct. 2848, 101 L.Ed.2d 885 (1988) (federal court may not "be called upon to adjudicate an internal dispute [over local school funding] between a local governmental entity and the very state that created it"). As a consequence of these jurisprudential barriers, the district court's monetary award for transportation costs against the State cannot stand.

2. Prospective Injunctive Relief

The State also stresses that its arguments concerning Eleventh Amendment immunity and standing apply with equal force to the district court's grant of injunctive relief. It calls attention to the fact that it has been enjoined to adhere to a state funding statute as that statute has been

interpreted by a federal court. The result will not be any enhancement of the desegregation programs in DeKalb County, which are already being funded by DeKalb as the Constitution requires, but, rather, a reallocation of resources from poorer, rural school districts to a wealthier suburban district. According to the State, this is beyond the power of the federal courts. As with the damages award, the State attacks DeKalb's standing to advance a Fourteenth Amendment or Title VI claim against it.

Moreover, the State challenges the district court's interpretation of the transportation funding statute at issue here. It takes the position that, since the early 1960's, when nearly every Georgia student attended his neighborhood school, or school for the attendance zone in which he resided, the statute has been construed consistently to provide transportaiton funding only for students residing more than one and one-half miles from their neighborhood shool based on the distance between their homes and that school. Finally, the State argues that DeKalb has failed to identify any nonmonetary injury which it has suffered as a result of the State's interpretation of the statute.

In support of the district court's grant of injunctive relief, DeKalb asserts that such a prospective remedy fits within the exception to Eleventh Amendemnt immunity recognized in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). DeKalb points to a number of cases where states have been ordered to help pay for the costs of desegregating local schools and have been enjoined to help fashion remedies for past segregation.

In *Young*, the Supreme Court carved out a "prospective-compliance" exception to the jurisdictional bar of the Eleventh Amendment, holding that a federal court could enjoin *state officials* "who threaten and are about to commence proceedings . . . to enforce . . . an unconstitutional act. . . ." 209 U.S. at 156, 28 S.Ct. at 452. The exception permits federal courts to enjoin state officials to conform their conduct to the requirements of federal

law, even if there is an ancillary impact on the state treasury. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 289, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977). When, however, "the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its [Eleventh Amendment] immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945); *Pennhurst*, 465 U.S. at 101, 104 S.Ct. at 908. A suit that is essentially one against the state is "barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 101-02, 104 S.Ct. at 909; *see Cory v. White*, 457 U.S. 85, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982).

While a number of state officials are named as defendants in this case in addition to the State of Georgia and its agencies, it is obvious that this is, in reality, a suit against the State itself. The only action the defendants are required to take to comply with the district court's injunction is to pay from the state treasury the additional funds specified by the district court. If the defendant state officials make those payments, they will not be in contempt of the court's order; if they fail to do so, such failure will constitute contempt. Therefore, as the Sixth Circuit found in *Kelley*, the injunctive relief is ancillary only to itself and does not fall within the *Young* exception. Thus, this action is in substance, one against the state, a proceeding barred by the Eleventh Amendment.

It is true, as DeKalb points out, that some states have been ordered by federal courts to help fund local desegregation efforts. They cite cases involving the desegregation of the Little Rock, Arkansas, Detroit, Michigan and St. Louis, Missouri school districts, in which state governments were ordered to participate in desegregation remedies. The district court found, however, that the state governments in each of those cases had far greater responsibility for primary and secondary education and

much more authority over the local school districts. In addition, the states or state agencies in those cases had participated in the desegregation litigation since its inception. *See, e.g., Little Rock School District v. Pulaski County Special School District, No. 1*, 778 F.2d 404, 411-17 (8th Cir. 1985) (Little Rock school case); *Bradley v. Milliken*, 540 F.2d 229, 232-34 (6th Cir.1976) (Detroit school case); *United States v. State of Missouri*, 515 F.2d 1365 (8th Cir.1975) (St. Louis school case).

On the other hand, federal courts have refused to require state participation in desegregation remedies when the state's participation was only sought years after the original desegregation litigation was initiated and when the primary responsibility for public education rested with the local school boards. The case factually closest to the present case is *Kelley v. Metropolitan County Board of Education of Nashville & Davidson County*, 836 F.2d 986. In *Kelley*, the Metropolitan County Board of Education of Nashville and Davidson County sued the State of Tennessee some 26 years after the filing of a desegregation suit involving Nashville and Davidson County seeking reimbursement for its past desegregation costs and injunctive relief to compel the State to fund future desegregation efforts. The district court concluded that a retroactive award for past costs would violate the Eleventh Amendment but did enjoin the State to pay for 60% of the local district's future desegregation costs.

On appeal, the Sixth Circuit Court of Appeals held that the grant of prospective relief violated the Eleventh Amendment. Kelley, 836 F.2d at 988. The court noted that the case before it was not about the merits of desegregation or various methods for achieving that goal, but simply a contest about money, about who would pay the bill for desegregation measures already in effect. *Id.* at 990. According to the court, the fact that the state had been a constitutional wrongdoer prior to 1956 did not mean it remained a constitutional wrongdoer more than

30 years later. *Id.* at 994. Furthermore, while the state might have an obligation to eliminate the lingering effects of *de jure* segregation, federal law did not require that the obligation be discharged by payments directly from the state treasury rather than through funds raised by the local school authorities. *Id.*

A similar result was reached in *United States v. Texas Education Agency*, 790 F.2d 1262 (5th Cir.1986), *cert. denied*, 479 U.S. 1030, 107 S.Ct. 874, 93 L.Ed.2d 828 (1987). In that case, the Lubbock Independent School District filed a motion to divide the costs of its desegregation measures with the state some 14 years after the original lawsuit was filed. The district court denied the motion, and the Fifth Circuit Court of Appeals affirmed. In the view of that court, the case constiuted "the LISD's belated effort to recover costs which smacks of an attempted end-run around the Texas legislature's allocation of state funds. Yet the State has not been an active party to his suit since 1970, and it has never been adjudicated responsible for that segregation in Lubbock which has proven costly to eliminate." *Id.* at 1265.

Finally, the Fourth Circuit Court of Appeals recently rejected efforts to impose on the State of South Carolina some of the costs of desegregating the Darlington County schools. *Stanley v. Darlington County School District*, 84 F.3d 707. There, the district court had permitted the local district to join the State as a defendant approximately 30 years after the original desegregation lawsuit was filed and had ordered the State to pay 15% of the costs of the relief granted in the case. The appellate court reversed, concluding that the district court had wrongfully joined the State in the litigation where neither the original plaintiffs nor the United States as intervenor had sought to pursue a claim against the State. *Id.* at 715-16. The court held that a federal court lacked authority to entertain a contribution claim by a local school district against the State. *Id.* at 716-17.

In this case, DeKalb filed suit against the State over 20 years after the desegregation case against it began in an effort to shift the burden for some of the costs of its desegregation measures to the State and, by extension, the state's taxpayers at large. That effort is barred by the Eleventh Amendment and elementary principles of federalism.

While the parties have not addressed it, there appears to be an additional problem with a grant of prospective relief in this case. While federal courts have broad equitable powers to remedy the wrongs caused by *de jure* segregation, "it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554, 566 (1971). Further, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Id.* Therefore, once a local school district has achieved unitary status, the role of the district court comes to an end. *See generally Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976). Thus, the Fifth Circuit Court of Appeals has refused to approve additional equitable relief once a school district achieved unitary status. According to that court,

> accommodation of federal superintendence and federalism will not tolerate the idea that although the wrong is righted, the magnitude of the past wrong nonetheless justifies perpetuation of a federal order limiting the ambit of a school district's self-governance. It is state government that we are asked to enjoin. Surely, faithfulness to federalism counsels that having righted the wrong, the limits we will impose on the state can be drawn no more tightly than the limits of the Constitution.

United States v. Overton, 834 F.2d 1171, 1177 (5th Cir. 1987).

In this case, the district court has enjoined the State to alter its interpretation of a state statute in order to provide DeKalb with additional state funding for its desegregative transportation programs. Yet the district court in the desegregation case concluded that DeKalb had achieved unitary status with respect to transportation in 1988, a holding not appealed by the plaintiffs, and that court recently found that the DCSS was unitary in all aspects of its operations. Like the Fifth Circuit Court of Appeals, we do not believe that the prospective injunctive relief granted in this case can be reconciled with a finding that the DCSS has achieved unitary status.[20] In our view, a federal court lacks authority to compel compliance with such an indeterminate prospective order once the Constitutional violation has been remedied. For these reasons, the district court's grant of injunctive relief to DeKalb requiring the State to fund DeKalb's future transportation costs must be reversed.

B. *Plaintiffs' Appeal.*

DeKalb appeals the district court's rejection of its request for reimbursement for some of its non-transportation desegregation costs. In its opinion, the State's history of enforcing segregation renders it liable for at least some of DeKalb's costs in desegregating its schools.

As stated above, the district court found that DeKalb was primarily responsible for operating its public schools and, further, that the State had not impeded DeKalb's M to M or magnet school programs. Therefore, as a factual matter, the State could not be held liable for DeKalb's costs in developing and implementing those desegregation programs. Furthermore, for the reasons dis-

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[20] For the same reason, we doubt that the district court had authority to award DeKalb its past desegregative transportation expenses once DeKalb had been found to be unitary with respect to its transportation operations. Since we have decided, however, that the district court's award of such expenses must be reversed on other grounds, we need not reach that issue.

cussed earlier respecting DeKalb's transportation expenses, the State may not be required legally to contribute to those costs. DeKalb has not cited any case where there was a similar division of responsibility for public education, and where liability for desegregation costs was sought to be imposed on state government years after the initiation of such efforts, which held the state financially responsible for local school desegregation efforts. The Courts of Appeals for the Fourth, Fifth, and Sixth Circuits have rejected such claims for state contribution in similar circumstances, and we feel compelled to follow their course. *Stanley*, 84 F.3d at 716-17; *United States v. Texas Education Agency*, 790 F.2d at 1264-65; *Kelley*, 836 F.2d at 988-1001. The district court's rejection of DeKalb's claim for programmatic costs is therefore affirmed.

The judgment of the district court is AFFIRMED in part and REVERSED in part.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:90-cv-1769-WCO

DEKALB COUNTY SCHOOL DISTRICT, *et al.*,
Plaintiffs,

v.

WERNER ROGERS, *et al.*,
Defendants.

AMENDED JUDGMENT

This action having come before the court, Honorable William C. O'Kelley, United States District Judge, for consideration of the motion for entry of a corrected judgment and the court having granted same, it is

Ordered and Adjudged that the plaintiffs recover of the defendants the total amount of $27,912,895 and the cost of this action. It is further adjudged that interest on the $18,653,638 awarded to plaintiffs for the period October 18, 1986 through FY 1992 shall be at the rate provided by law and run from September 28, 1994, the date on which the original judgment was entered; and interest on the $9,259,257 awarded to plaintiffs for FY 1993 and 1994 shall be at the rate provided by law and run from the date on which the corrected judgment is entered.

Dated at Atlanta, Georgia, this 16th day of August, 1995.

LUTHER D. THOMAS
Clerk

By: /s/ Deanna McDonald
Deputy Clerk

Prepared, Filed, and Entered August 16, 1995

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:90-cv-1769-WCO
DEKALB COUNTY SCHOOL DISTRICT, *et al.*,
Plaintiffs,

v.

WERNER ROGERS, *et al.*,
Defendants.

ORDER

The Plaintiffs' Motion with Consent of Defendants for Entry of Corrected Judgment having been heard and considered, and good cause having been shown for the granting of said motion, Plaintiffs' Motion with Consent of Defendants for Entry of Corrected Judgment is hereby granted in its entirety. A corrected judgment in the total amount of $27,912,895.00 shall be entered by the Clerk accordingly. It is further ordered, at Plaintiffs' request and without the consent of Defendants as to this point, that interest on the $18,653,638.00 awarded to Plaintiffs for the period October 18, 1986 through FY 1992 shall run from September 28, 1994, the date on which the original judgment was entered; and interest on $9,259,257.00 awarded to Plaintiffs for FY 1993 and 1994 shall run from the date on which the corrected judgment is entered.

IT IS SO ORDERED.

/s/ William C. O'Kelley
THE HONORABLE WILLIAM C. O'KELLEY
Judge
United States District Court

[Filed Dec. 19, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. 1:90-CV-1769-WCO

DEKALB COUNTY SCHOOL DISTRICT, *et al.*

versus

WERNER ROGERS, *et al.*

ORDER

This case is presently before the court on defendants' moiton to reconsider, alter or amend judgment of this court's order of September 23, 1994 [55-1]. The defendants want the court to vacate that portion of the order and judgment awarding DeKalb County damages and injunctive relief against the State of Georgia for transportation costs for students attending schools outside of their assigned attendance zone. Plaintiffs have filed a motion to amend the findings of fact, conclusions of law, and the judgment [56-1].

LEGAL ANALYSIS

A motion for reconsideration should be filed only when, after careful consideration, it is deemed "absolutely necessary" by the movants. L.R. 220-6, N.D. Ga. "In general, a motion for reconsideration should not be filed absent new precedent, newly discovered evidence, or manifest error." *Hartford Fire Ins. Co. v. Jemco Servs., Inc.*, No. 2:90-cv-54-WCO (N.D. Ga. Dec. 19, 1991) (quoting *Region 8 Forest Serv. Timber Purchasers Council v.*

Alcock, No. 1:89-cv-2741-ODE (N.D. Ga. Aug. 8, 1990)). *See also Kern-Tulare Water District v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986) (three bases for motion for reconsideration: (1) intervening change in controlling law; (2) availability of new evidence or an expanded factual record; or (3) need to correct a clear error or to prevent manifest injustice), *aff'd in part and rev'd in part*, 828 F.2d 514 (9th Cir. 1978), *cert. denied*, 486 U.S. 1015 (1988).

I. Defendants' Argument

Defendants contend that this court's decision "directing the state to pay the County the past transportation monies allegedly owed the County" was erroneous. In its order of September 23, 1994, the court awarded DeKalb County the amount of additional transportation funds it would have received from the state for fiscal years 1978 through 1992. The court also awarded injunctive relief requiring the state to adhere to O.C.G.A. § 20-2-188 and to base its future determination of transportation funding upon "each student's actual school assignment as directed by state law." Defendants contend that this relief was beyond the constitutional limits of this court's jurisdictional authority as defined by the Supreme Court in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) (hereinafter *Pennhurst II*)).

A. Violations of Title VI Of the Civil Rights Act

As stated earlier in an order from this court, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et. seq.*, expressly abrogates the Eleventh Amendment for amounts due from October 21, 1986 forward. *See* Order, March 27, 1991, pp. 8-9; 42 U.S.C. § 2000d-7(b); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The court agrees with the defendants that any monies awarded before October 21, 1986 are in conflict with the Eleventh Amendment and, thus, are jurisdictionally barred. Of the

$24,632,351 awarded paintiffs, approximately $18,653,638 is attributable to the period after October 21, 1986. Thus, the court will adjust its award to include only that money which can be traced to the period after October 21, 1986.

The defendants argue that the appropriate statute of limitations under Title VI is two years. As DeKalb County filed its lawsuit on August 13, 1990, the two-year statute of limitations that defendants argue for would bar any award of Title VI damages for violations occurring before August 13, 1988. The state defendants did not plead statute of limitations as an affirmative defense in this case, as required by Fed. R. Civ. P. 8(c). Therefore, the statute of limitations defense has been waived. *Paetz v. United States*, 795 F.2d 1533, 1536 (11th Cir. 1986) (failure to plead statute of limitations defense deemed waiver); *American Nat'l Bank v. FDIC*, 710 F.2d 1528, 1537 (11th Cir. 1983) (failure to plead statute of limitations as an affirmative defense in party's pleadings as required by Fed. R. Civ. P. 8(c) results in waiver of defense). At this late stage in the proceedings, after completion of the trial, the state defendants cannot attempt to assert a staue of limiations defense through a Motion to Reconsider.

Title VI, like many federal civil rights statutes, does not contain a specific limitations period. In such a situation, the court should "adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261-266-67 (1985); *Champion v. Georgia Bureau of Investigations*, 568 F. Supp. 712 (N.D. Ga. 1983). The court first selects the "most appropriate" or "most analogous" state statute of limitations to apply to the federal claim. *Wilson*, 471 U.S. at 268. The court then should consider whether application of that limitations period is consistent with the federal statute and its underlying policies. *Id.* at 266-68. The court does not have to determine the appropriate statute

of limitations in this case, as the defendants did not raise the issue in a timely manner as required by Fed. R. Civ. P. 8(c).

The defendants also contend that DeKalb County, as a political subdivision of the State of Georgia, lacks standing under Title VI to bring this lawsuit. *See United States v. Alabama,* 791 F.2d 1450, 1456-57 (11th Cir. 1986). Defendants appear to ignore the fact that there are individual plaintiffs in this case. These individuals are "persons" under Title VI, and are entitled to bring suit under that statute. *See Georgia State Conf. of Branches of NAACP v. Georgia,* 775 F.2d 1403 (11th Cir. 1985).

B. Violations of the Fourteenth Amendment

The court's September order includes a section on the alleged violations of federal law, and discusses Title VI, the Equal Educational Opportunities Act of 1974 ("EEOA"), and the Fourteenth Amendment. The defendants have not asked the court to reconsider its decision regarding the EEOA. In terms of the Fourteenth Amendment, this court stated in its September order the following: "Under the Fourteenth Amendment the continuation of these [transportation] policies and practices is unlawful." Order, September 23, 1994, p. 26. The court did not rely on the Fourteenth Amendment in its decision to grant retroactive relief. It only relied on the Fourteenth Amendment in its discussion of prospective relief.

The Eleventh Amendment does not bar the prospective injunctive relief awarded by the court under the exception recognized in *Ex Parte Young,* 209 U.S. 123 (1908). That case, and many following it, hold that state officials may be sued in their official capacity in federal court in suits seeking prospective injunctive relief to end a continuing violation of federal constitutional or statutory law. *Ex parte Young,* 209 U.S. at 159-60; *Papasan v. Allain,* 478 U.S. 265, 282 (1986); *Green v. Mansour,* 474

U.S. 64, 68 (1985). This exception applies even when the "relief that serves directly to bring an end to a present violation of federal law is . . . accompanied by a substantial ancillary effect on the state treasury." *Papasan,* 478 U.S. at 278; *see also Edleman v. Jordan,* 415 U.S. 651, 667-68 (1974). Thus, there is no problem of Eleventh Amendment immunity with respect to the prospective relief granted under the Fourteenth Amendment.

C. Violations of State Law

The court agrees with the defendants that a federal suit against state officials on the basis of state law is barred by the Eleventh Amendment. *Pennhurst II,* 465 U.S. at 117. Even the doctrine of pendant jurisdiction does not repeal the Eleventh Amendment. *Pennhurst II,* at 120-121. The court will take this opportunity, therefore, to correct any discrepancies and clarify any misperceptions that could be construed from a reading of the court's order of September 23, 1994.

The issue of Eleventh Amendment immunity with respect to the state law claims was not previously raised by the defendants in their Motion to Dismiss of September 24, 1990. Therefore, the court's earlier order of March 27, 1991, did not discuss the preclusory effect the Eleventh Amendment has on issues of state law, nor did the court's September order address this issue. The March 1991 order addressed Eleventh Amendment immunity with respect to Title VI, the EEOA, and certain individual defendants, as those were the issues raised by the defendants at that time. The court will now clarify that the state is afforded protection by the Eleventh Amendment. This court cannot rectify past state wrongs committed under state law by state officers without violating established principles of comity and federalism. State law questions are confined to the state.

The court's decision regarding the transportation policies of the State of Georgia is based on both the Fourteenth

Amendment and Title VI. The decision cannot and does not rest on state law grounds. The prospective relief pertaining to the application of the state transportation policy is based on the Fourteenth Amendment, as discussed above and in the September order. With regards to the monetary relief awarded from October 21, 1986 to the present, the court hereby corrects any confusion the parties may have concerning the earlier order: the monetary relief was awarded on the basis of Title VI. In the instant case, interpreting O.C.G.A. § 20-2-188 was necessary to determine the amount of state funding to which plaintiffs were entitled. State law provided the court with the appropriate measure of damages.

The court's September order included a discussion of O.C.G.A. § 20-2-188. *See* Order, September 23, 1994, pp. 20-23. In that discussion, the court found that the state's interpretation of the statute was not consistent with the statutory language. The court now modifies that section of its earlier order. The retroactive relief awarded DeKalb County is not based on any interpretation of state law. The prospective injunctive relief is still based, in part, on state statute, O.C.G.A. § 20-2-188. The final paragraph on page 23 of the September order should now read as follows:

> Under its current practice, the SDE draws bus routes based on the students' residences. To conform with state law, the only change required would be for the SDE to base its routes on each child's actual school assignment. The state is hereby enjoined from continuing to ignore magnet and M to M students in its future calculation of transportation funding, and is ordered to base its determination of transportation funding on *each student's actual school assignment* as directed by state law.

The only change in this paragraph is that the last sentence has been deleted. Order, September 23, 1994,

p. 23 (the court has removed the following sentence: "Moreover, since the SDE has violated state law, the local district is entitled to be paid the transportation funds that have been wrongfully withheld since the implementation of the M to M and magnet programs.") The court finds that this correction is necessary to verify that the September order does not violate the Eleventh Amendment protection afforded the states.

The section of the court's order entitled "Remedy" must also be corrected. See Order, September 23, 1994, p. 42. The court hereby directs that today's order shall preempt any conflicting portions of the September order. This order clarifies that the award of transportation costs to DeKalb County is based solely on Title VI. To determine what those costs were, the court examined state law to see what would have been paid under the state statute if the statute and had been interpreted in a consistent, and constitutional, manner. Thus, the method the court adopted for ascertaining damages was to determine what the state would have paid if it had complied with Title VI. As indicated above, such monies will only be calculated from October 21, 1986 forward. The defendants also cited language in the section entitled Transportation Costs in arguing that this court awarded monies for violations of state law. Again, the discussion of state law in the section entitled Transportation Costs was a method for determining the damages DeKalb County was entitled to under Title VI. *See* Order, September 23, 1994, p. 16.

II. Plaintiffs' Argument

A. Conclusions of Law

Planitiffs have filed a motion asking the court to reconsider that portion of the Order that held that the state defendants did not violate the Equal Educational Opportunities Act of 1974 ("EEOA"). The court still finds that the transportation policy is *not* a vestige of the dual

school system, and, thus, the state has not violated the EEOA in the allocation of transportation funds.

Plaintiffs seek modification of the court's order to clarify that the court found that the defendants violated Title VI. The court thought this holding was clear in the original order, and has expressly stated this finding again in this order. The state's "attendance area" based funding procedures for pupil transportation violate Title VI of the Civil Rights Act of 1964.

B. Judgment

Plaintiffs have presented evidence of the amount of state transportation funding the school district should have received for FY 1993 and 1994, and seek to have the judgment amended to include those amounts. The proposed amount is $9,259,257. Plaintiffs contend that the method used to calculate this amount was the same as the method used at trial, to which the defendants did not object. The court hereby gives the defendants 30 days to comment *specifically* on this amount. Plaintiffs' motion also seeks to have the judgment amended to require the state defendants to pay the school district for any amounts wrongfully withheld during the current fiscal year and thereafter until the state has brought its methods of calculation into compliance with the court's order. The court will not award funds for 1995 or any future fiscal years at this time. Defendants should have an opportunity to comply with the court's order.

CONCLUSIONS AND AMENDED JUDGMENT

The court hereby amends its judgment entered on September 23, 1994, to include monetary relief only from October 18, 1986 to the present. Thus, the court finds for the DeKalb School District in the amount of $18,653,638. The court has also clarified that it relied on Title VI to find that the state owed DeKalb County

money for past violations related to the transportation policy. Title VI, the Fourteenth Amendment, and Georgia law, O.C.G.A. § 20-2-188, were all relied on for the finding that the continuation of the state's policies would be unconstitutional. Thus, the Fourteenth Amendment and Georgia law were used only as a basis for prospective relief. State law, specifically O.C.G.A. § 20-2-188, was used to determine the amount of damages owed the plaintiffs, due to the violation of Title VI.

Thus, the defendants' motion to reconsider, alter or amend judgment is hereby GRANTED in part and DENIED in part [55-1], as indicated by this order. The plaintiffs' motion to amend is also GRANTED in part and DENIED in part [56-1], with the exact amount of money due for FY 1993 and 1994 to be determined after defendants have had a chance to comment.

IT IS SO ORDERED this 19th day of December, 1994.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Chief United States District Judge

[Filed Sept. 23, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. 1:90-CV-1769-WCO

DEKALB COUNTY SCHOOL DISTRICT, *et al.*

versus

WERNER ROGERS, *et al.*

ORDER

The captioned case was tried before the court without a jury in Atlanta, Georgia on July 28-30, 1993. Based on the evidence adduced at that trial, the court now makes the following findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

The case has two components that the court will address. First, plaintiffs contend that defendants have implemented a policy that denies transportation funding for students who attend schools outside their neighborhoods in order to participate in Majority to Minority or magnet school programs—programs designed to further desegregation. By refusing to provide transportation funding for those programs, the plaintiffs contend that the defendants have violated their constitutional and statutory obligations with regard to school desegregation in DeKalb County. Plaintiffs seek an order from the court directing the state to pay the County the past transportation monies allegedly owed the County under Georgia law.

Second, the court must decide whether the State of Georgia and other state defendants should be required to help pay the costs incurred in desegregating the DeKalb County School System ("DCSS"). The plaintiffs contend that the state is liable because the state participated in the creation of the dual system of schools, one set for black students and one set for white students, and encouraged its perpetuation even after the U.S. Supreme Court declared such school systems unconstitutional. The plaintiffs further contend that the state, having created the dual school system, has an affirmative duty to eliminate all vestiges of the dual school system. The plaintiffs concede that the local board also has this duty. Plaintiffs allege that the state defendants failed to fulfill their constitutional affirmative obligations and instead discouraged desegregation.

FINDINGS OF FACT

I. General Background

The DeKalb County School District ("DCSD") is in a predominantly urban and suburban region with a population of more than 450,000. The school system serves almost 80,000 students in more than 90 schools and is the largest school system in the State of Georgia. Since 1969, DCSD has ben subject to the supervision and jurisdiction of the United States District Court for the Northern District of Georgia. In 1969, black pupils constituted only about five percent of the local district's enrollment. However, in the 1970's and 1980's, massive demographic changes took place in DeKalb County with the result that by the 1992-93 school year, 66% of the district's enrollment was black. The Black population growth occurred primarily in South DeKalb County, and the schools in that area reflect such growth in their enrollments; they are predominantly black. In North DeKalb County, into which there has been much less movement of black fami-

lies, the schools have remained predominantly white. These disparities have led to much of the litigation presently before the court, and the desegregation programs described in these findings have been directed at reducing racial and other disparities among DeKalb's schools.

DeKalb County currently receives funding under the uniform state-wide funding formula of Georgia's Quality Basic Education Act ("QBE"). O.C.G.A. § 20-2-130, et seq. In June 1990, the DCSD formally requested the State Superintendent, the State Department of Education ("SDE"), and the State Board of Education ("SBE") to assist it with the implementation of its desegregation plan, particularly the substantial transportation and other costs involved in operating the magnet and Majority to Minority ("M to M") programs.[1]

The plaintiffs in this lawsuit are the DeKalb County School District; the members of the DeKalb County Board of Education, acting on the Board's behalf; the Board acting on behalf of the students under its supervision; and several individual plaintiffs. The defendants are the State of Georgia and sixteen state officials and agencies, including, among others, the Governor, the SBE and its members, the SDE, and Dr. Werner Rogers, the State Superintendent of Schools.

A. Desegregation History

Historically, the DeKalb County School District segregated its schools in accordance with state laws requiring separate schools for black and white students. In this regard, the local school system was similar to other Georgia school systems. Following the Supreme Court decision in *Brown v. Board of Educ.*, 347 U.S. 483

[1] In the Majority to Minority transfer program, a student may voluntarily transfer from a school in which he is in the majority to a school in which he is in the minority, with transportation furnished by the school system.

(1954) ("*Brown I*"), which invalidated the principle of "separate but equal," the schools remained completely segregated for another 12 years. *See also Brown v. Board of Educ.*, 349 U.S. 294 (1955) ("*Brown II*") (directing that segregated school systems should be dissolved with "all deliberate speed").

The move to desegregation did not occur with all deliberate speed throughout much of the South; Georgia was no exception. The public schools in DeKalb County remained segregated. Throughout the 1950's and 1960's, Georgia's governors, the General Assembly, and state and local leaders attempted to block desegregation and were remarkably successful. Just one example of a law passed by the General Assembly during this time is indicative of the reaction by the state to *Brown I* and *Brown II*. In 1955, the legislature enacted 1955 Ga. Laws 174 which provided that no state or local funds would be appropriated or expended for public school purposes "except for schools in which the white and colored races are separately educated." [2] State officials, including the Attorney General and the State Superintendent, also directed their efforts to halting school desegregation. For example, on or about August 31, 1955, Attorney General Cook declared that the *Brown I* decision did not require local school boards in Georgia to make any move toward desegregation and advised local school boards not to take any steps toward desegregation.

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[2] Other examples abound. 1956 Ga. Laws 11 authorized the State to sublease any State School Building Authority facility for private educational purposes. This statute evidenced the State's intent to facilitate private school education for parents seeking to avoid sending their children to desegregated schools. 1956 Ga. Laws 642 declared the United States Supreme Court's *Brown* decisions and all similar decisions "null, void and of no effect" in the State of Georgia. 1957 Ga. Laws 168 authorized the Governor to suspend operation of the Compulsory School Attendance law.

Until 1961, the state's efforts to block desegregation were successful. However, in 1961, the Court of Appeals for the Fifth Circuit ordered that two black students be admitted to the University of Georgia. Rather than close the University because of the School Closing laws, *see* 1956 Ga. Laws 6; 1959 Ga. Laws 15, the Governor and General Assembly relented and repealed the state laws prohibiting the funding of integrated schools. *See* 1961 Ga. Laws 35. However, at the same time it took action to repeal some of the segregation laws, the Governor and General Assembly took other actions to ensure that schools in Georgia remained segregated.

The General Assembly decided to decentralize Georgia's schools to a greater extent, thus forcing civil rights plaintiffs to sue every school district individually. From 1937 to 1961, Georgia law required the State Board of Education to "provide rules and regulations for the supervision of all public schools of this State . . . [and] make such rules and regulations as may be necessary for the operation of the common schools." 1937 Ga. Laws 39. Under the earlier law, the SBE had complete authority over local school districts. However, under 1961 Ga. Laws 39 et seq., the SBF's broad authority over Georgia public schools was essentially repealed. In addition to the repeal of the pre-existing authority of the SBE, the General Assembly also provided tuition grants for students who wished to attend private, segregated schools. 1961 Ga. Laws 35.

During the tenure of Governor Lester Maddox, from 1967-1970, there was vocal and unflagging opposition to desegregation. Maddox did everything within his power to resist federal school desegregation efforts, including having the state sue Health Education and Welfare Secretary Finch and the Attorney General of the United States, George Mitchell. During its 1970 session, the General Assembly passed House Bill 1651, which provided that

a school district could not assign students or teachers to any school for the purpose of overcoming racially identifiable schools. This statute represented a further measure by the State of Georgia to control assignment of students and teachers at the local school level so as to prevent desegregation. In addition, the SBE continued to approve school sites that were clearly intended to preserve segregated schools. *See* Letter from John Doar of the Justice Department to State Superintendent Nix, June 7, 1967.

During this time, the state continued to fund transportation on a segregated basis in violation of its own policies. By 1964, the SBE had adopted a policy which denied transportation funding for students who were transported from one attendance zone to another attendance zone. Some individuals challenged the policy to obtain transportation funding for white students who elected to attend white schools outside their attendance zone under freedom of choice plans. The SBE agreed to provide transportation funds for freedom of choice plans which were used to preserve segregation. *See* J. Maddox Deposition, p. 103, 109. This policy is directly contrary to the SDE's current practice under which the actual school assignment of M to M and magnet students is *not* considered.[3]

B. The State's Role in Education

The State of Georgia's historical role in encouraging the segregated system is documented and undisputed. Thus, the court will not digress into a history of segregation in Georgia. The "provision of an adequate public

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[3] Mr. Maddox reiterated many times at his 1968 deposition that in 1968, the SDE based its survey and determination of bus routes on the actual school assignment of the student, as determined by the local district. J. Maddox Deposition, pp. 74-75, 82-84, 86-87, 101, 112-13.

education" is "a primary obligation of the State of Georgia." Ga. Const. Art. 8, § 1, ¶ 1 (1983). This said, counties have always controlled the day-to-day operation and management of public schools. *See* Ga. Const. Art. VIII, § V, ¶¶ I, III. Local officials have the primary responsibility for "site selection, school maintenance, funding contributions, use of school property, teacher hiring and placement, pupil assignment, pupil transportation and curriculum." *Amour v. Nix,* No. 16708, at 5 (N.D. Ga. Sept. 24, 1979), *aff'd*, 446 U.S. 930 (1980).

As noted by Judge Edenfield in his recent order in *The Board of Public Education for the City of Savannah and the County of Chatham v. Georgia,* CV 490-101 (S.D. Ga. Aug. 11, 1993) (hereinafter *Savannah*), "[d]espite the county organization of schools in Georgia, the state always has exercised influence over local schools, primarily by holding the purse strings." *Id.* at 3. Local school systems depend on state monies to pay for many of their costs, including transportation of students. While the public schools of DeKalb County are governed, managed, and controlled by the DeKalb County Board of Education, the majority of their funding does come from the state.

II. Transportation: Assignment of Students and Funding

Pupil transportation is a critical school activity controlled by county officials yet funded by the State. In DeKalb County, as everywhere, the county school board owns the school buses and employs the school bus drivers. It is the State Department of Education, however, which plans and plots the local school system bus routes, for the purposes of calculating the amount of state funding assistance under Q.B.E. The bus routes actually used by a county school system are strictly a county decision. Pupil assignment, which particular school a pupil attends, is within the exclusive control of the county school board. The county board of education determines the attendance

zones for the schools, and the county board of education possesses the authority to reassign pupils to achieve racial balance in a county's public schools.

The funding of transportation for local school districts is governed by O.C.G.A. § 20-2-188. At the time this lawsuit was brought, the policy in effect for calculating the amount of funds allocated to each local school district for pupil transportation was Policy ED(1)G. The policy provided the following:

> Pupil transportation funds shall be calculated on the basis of the school having available space in the pupil's grade level nearest the pupil's place of residence.

Policy ED(1)G was repealed in January 1991.

In June 1990, the DCSD made a request for assistance to desegregate the DeKalb County Schools, including transportation funding for the M to M and magnet programs.[4] While the SDE did not formally respond, the state took the same position with respect to this request that it had taken on a similar request by Savannah-Chatham County. In a reply to Savannah-Chatham Couty's Superintendent, Dr. Werner Rogers, the State Superintendent of Schools, stated that the state was not a party to the litigation and had never been liable; that no funds had been appropriated for that purpose; and that SDE policies, including Policy ED(1)G, precluded such funding. The court finds that Policy ED(1) was a substantial factor in the SDE's decision to deny transportation funds for magnet and M to M programs.

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[4] This was not the first time DeKalb County sought transportation money from the State Board of Education. As early as 1979, some plaintiffs were alleging that the Board failed to provide transportation for students using its Majority to Minority transfer program.

A. History of Transportation Funding

Much of the evidence introduced by plaintiffs at trial dealt with allegedly discriminatory policies and practices by the state in the funding of transportation. During the 1960's, when many local communities adopted freedom of choice plans for student attendance, the state paid to transport students to the schools of their choice, even if the students lived less than a mile and a half from another school. The SDE currently takes the position that it cannot use actual assigment as a basis for computation because it would be inefficient. Thornhill Deposition, p. 42. However, in 1958, when parents sought transportation funding for students who elected to attend segregated schools far from home, they were allowed to do so, and their transpotration was paid for by the state. Thus, the state has used actual student assignments as a basis for funding in the past. Unlike other instances of discriminatory behavior by the state, which had become largely passive rather than active by the mid-1970's, plaintiffs introduced evidence that the state has continued to the present time to follow discriminatory policies and practices in its allocation of funding for student transportation.

By the start of the 1970's, a new controversy in the field of school desegregation had arisen. Compulsory busing of pupils away from their neighborhood schools to a more distant facility received opposition from many, including parents of both races. When school districts discarded freedom of choice plans in favor of busing, the State Board of Education adopted policy ED(1)G.[5] Despite this written policy, however, the State Board made an exception for busing plans approved by the United States Office of Civil Rights, Department of Health, Education and Welfare.

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[5] "Pupil transportation funds shall be calculated on the basis of the school having available space in the pupil's grade level nearest the pupil's place of residence." State Board of Education, Policy ED(1)G.

The historical context in which Policy ED(1) was adopted by the SBE leaves little doubt that it was adopted for the discriminatory purpose of discouraging local districts from adopting desegregation plans which assigned children to schools outside their neighborhoods. *See* 1970 Ga. Laws 89 (antibusing law). On April 25, 1972, the Savannah School Board filed motions in which it sought to join the state as a party in its pending desegregation case and to obtain a declaratory judgment that the SBE's denial of transportation funding was unconstitutional. The documents filed in support of the claim alleged that the state allotments included an increase in funds for the transportation of elementary students but made no provision for the increased cost of transporting secondary school students pursuant to the court orders. On June 22, 1972, the SBE approved Policy ED(1)G.

The court finds that non-neighborhood school-based assignments were often necessary to desegregate school districts in areas where housing patterns were segregated by race. The SBE was well aware of this, and the SBE policy was intended to discourage desegregation in such districts by withholding transportation funds for desegregative transfers. The timing of the adoption of policy ED(1) indicates that this change was made to bolster the SBE's argument that it did not have to pay for additional busing transpotration under the Savannah School Board's secondary school plan. The state's conscious decision to withhold funding for all but neighborhood school plans served to discourage the only effective means of desegregation in many school districts and discriminated against those school districts and students seeking to desegregate with the use of either mandatory or voluntary non-neighborhood school assignments.

B. Allocation of Transportation Funds

Plaintiffs contend that the SDE and SBE have followed discriminatory practices in allocating transportation funds to local school districts and that such discriminatory prac-

tices continue today. The state pays to transport students to and from schools only in their attendance zones. O.C.G.A. § 20-2-188 (1992). The state uses a theoretical or model routing plan which SBE transportation personnel develop and use for state funding calculation purposes only. This route developed by the state does not and cannot bind DeKalb county as to where in fact it will run its school buses. The amount of transportation funding which each local district receives from the state is dependent on two factors: the number of buses allocated to the district and the number of route miles traveled by those buses. The state does not pay local school systems for their actual transportation costs. Instead, the state pays for what it considers the necessary cost of transportation as calculated by the SBE. The local school system must pay any additional costs. The state does not pay to transport students who attend schools outside their attendance zones.

The number of children being transported in DeKalb County as M to M transfers was 4,493 in FY 1992. The number of children being transported as nonresident pupils in magnet programs was 1,758 in FY 1992. This total of 6,251 amounts to about 8% of DeKalb County's total enrollment of over 70,000 students in its regular academic programs.[6]

To decide what funds are necessary, the SBE considers numerous factors including

> the number and density of students transported . . .; the suitability of school bus routes in the local unit; the suitability of the type and number of buses used by the local unit; the number of miles traveled by

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[6] Jutsice Blackmun noted in his concurring opinion in *Freeman v. Pitts* that the number of students participating in the M to M program was about 6% of the student population, while only around 1% of the system's students were involved in the magnet programs. *Id.*, 112 S. Ct. 1430, 1460 (1992). Thus, there has been a slight increase in participation in these programs.

> school buses in the local unit; minimum bus loads; transportation surveys, cost of transportation equipment.

O.C.G.A. § 20-2-188(a). While this statute permits the SBE "to consider any of these factors in calculating funds needed by local school systems, subsection (d) of the statute *requires* the State Board to consider another factor: distance between the student's home and school." *Savannah*, CV 490-101, at 14 (S.D. Ga. Aug. 11, 1992).

> Students who live beyond one and one-half miles from *the school to which they are assigned*, according to the nearest practical route by school bus, *shall be* eligible to be *counted as transported students* . . . provided such students are actually transported to such school by school bus . . . . Any student who resides within such mileage limitation shall not be eligible to be counted for school transportation state-aid purposes with the exception of handicapped students . . . .

O.C.G.A. § 20-2-188(d) (1992) (emphasis added).

According to trial testimony, the SBE employee first determines which children live within a mile and one-half of the school located in their residential attendance zone (the "zone school"), regardless of whether they in fact are assigned to that school by the local district. These children are considered ineligible for state transportation funds and are not counted in determining how many buses or bus routes are necessary. Thus, M to M and magnet children who live within one and one-half miles of their zone school, but in fact live more than one and one-half miles from the school which they actually attend, are not counted by the SBE as transported pupils in calculating state transportation funds. Although O.C.G.A. § 20-2-188 requires the State Board to count students who live more than a mile and a half from "the school to which they are assigned," the State Board construes this language to

mean the school in the student's residential attendance zone.

After the SBE employee determines which students live outside the one and a half mile area, the employee then draws by hand a bus route to take those students to their zone school. The route is not actually used, but is designed to be the most efficient route possible. No bus routes are provided to transport M to M and magnet students to the schools to which they are actually assigned by the local district. The employee then determines the number of buses necessary to operate the SBE's "ideal" route. The number of miles traveled by buses on the "ideal" routes is then calculated for a 180-day school year. Finally, the employee figures the funding to be allocated to the school district. For each bus, the state allocates a fixed amount for the driver's salary, insurance, and bus replacement cost. For each route mile, the district receives a fixed amount to cover maintenance, fuel, and other costs.

The SBE's method of calculating transportation funds adversely affected the DCSD in a number of ways. Prior to the 1986-87 school year, the district was denied all transportation funding for children in M to M and magnet programs. In 1986-1987, the SDE began treating all M to M and magnet students as if they attended their zone schools, when in fact they did not. Thus, if a child lives within a mile and one-half of his or her zone school, but is actually assigned and attends a school more than one and one-half miles from his or her home, then this individual is not counted at all in determining the number of buses or routes that are allocated to the local district.

Even if M to M and magnet children live more than a mile and a half from their zone school, they are treated as if they are assigned and attend the zone school. They are included in the regular bus routes for the zone school, even though they are not assigned and do not attend that school. The actual routes and buses necessary to carry

M to M and magnet students to their assigned schools are not considered by the SBE in computing transportation funding. This means that the district receives less money for drivers' salaries, bus replacement, fuel, maintenance, and other costs. The end result is that the local district bears virtually the entire cost of transporting children under the M to M and magnet programs.

Plaintiffs contend that O.C.G.A. § 20-2-188 requires the state to pay to transport all students to the schools they actually attend, rather than merely to their zone schools. The plaintiffs also allege that the state's transportation funding policy is violative of the Fourteenth Amendment, Ttitle VI, and the Equal Educational Opportunity Act ("EEOA").

C. Transportation Costs

At trial, the local district introduced evidence of its M to M and magnet program transportation costs for fiscal years 1978 through 1992 in the amount of $34,726,764.[7] The most the state has paid towards that cost is $740,397. The local district does not contend that the state must pay for 100% of the district's transportation costs. Rather the district seeks the amount of additional transportation funding the district would have received from the state if the state had interpreted O.C.G.A. § 20-2-188 in the manner argued for by plaintiffs. The local district introduced evidence showng that if the state had paid for transportation based on actual school assignment, the district would have been paid $25,372,748 in transportation funding through fiscal year 1992. Deducting the $740,397 that the district did receive, leaves $24,632,351 in state entitlements unpaid. The state did not contest this amount.

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[7] The portion spent on M to M transportation was $27,456,641. The amount spent on magnet transportation was $7,270,123. Thus, the total spent on transportation for both programs was $34,726,764.

III. Affirmative Duty to Desegregate

The second prong of plaintiffs' claim seeks funding from the state for desegregation programs such as the M to M and magnet schools. In *Green v. New Kent County School Board,* 391 U.S. 430 (1968), the Supreme Court held that states which had segregation policies in effect at the time of *Brown I* also had an affirmative duty to assist local districts in eliminating the former dual school system and its lingering effects. *Id.* at 437-38. Since 1954, there have been several major educational initiatives in Georgia designed to improve or restructure education. In 1964, the Minimum Foundation Program of Education Act ("MFPA") was enacted.[8] 1964 Ga. Laws 3. In 1974, the Adequate Program for Education in Georgia ("APEG") was enacted. 1974 Ga. Laws 1045. In 1985, the Quality Basic Education Act ("QBE") was adopted. 1985 Ga. Laws 1657-1784. None of these laws provided any funding for desegregation programs. Under QBE, no funds are provided for magnet or M to M programs. Plaintiffs seek reimbursement of expenses that they have paid in an effort to eliminate the dual school system. Such costs fall into two categories: magnet program start-up and operating costs; and the cost of other *Milliken II* type desegreation measures. *See Millikan v. Bradley,* 433 U.S. 267 (1977) (hereinafter *Milliken II*).

A. The DeKalb County School District and the Pitts Litigation

In 1969, this court approved a desegregation plan which implemented a strict neighborhood school attendance policy. Under the plan, atendance zones were drawn around each school, and all students residing within the

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[8] This act gave the State Board of Education broad authority to develop its own funding formula for pupil transportation. This authority has continued to the present. *See* 1964 Ga. Laws 3, pp. 16-19; O.C.G.A. § 20-2-188.

attendance zone, regardles of their race, were assigned to the school. *Pitts v. Freeman,* No. 11946 (N.D. Ga., Order dated June 12, 1969). In the early 1970's, following the Supreme Court's suggestion of "Majority to Minority" pupil transfers in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971), DCSD implemented an M to M transfer program. When the M to M program was first implemented, the district did not provide any transportation to the students participating in the program. In *Pitts,* the court held that "[t]he effectiveness of an M to M program is also dependent upon the provision of free transportation." *Pitts,* No. 11946, 12 (N.D. Ga., Order dated Nov. 3, 1976). *See also Swann,* 402 U.S. 26-27. The court ordered that "[t]ransportation shall be provided at the expense of the school system to any M to M student who so requests and who lives more than one mile from the receiving school." *Pitts,* No. 11946, 25 (Nov. 3, 1976).

In 1986, the local district filed a motion requesting that it be declared unitary and that the *Pitts* case be dismissed.[9] This court in large part agreed. *See Pitts v. Freeman,* 887 F.2d 1438 (11th Cir. 1989), *rev'd in part, Freeman v. Pitts,* 112 S. Ct. 1430 (1992). This court held that DeKalb County had indeed achieved unitary status in four of the six factors identified in *Green v. New Kent County School Board,* 391 U.S. 430 (1968), namely, student school assignments, transportation, physical facilities, and extracurricular activities. The Supreme Court agreed that lower courts could relinquish supervision and control over school districts in incremental stages, but refused to dismiss the case entirely since the district court had found DeKalb County was *not* unitary with respect to faculty assignments, resource allocations, and quality of

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[9] The State of Georgia and its officials have never been parties to the school desegregation litigation against DeKalb County.

education. *See Freeman v. Pitts,* 112 S. Ct. 1430, 1441-42 (1992).[10]

There is no evidence before the court to suggest that DeKalb's M to M or magnet programs were ever hindered or interfered with by the state or state officials in their initial voluntary form or in their judicially modified form. The Supreme Court agreed with this court that DeKalb County's present racial imbalance in pupil attendance was the result of demographic changes in the county's population rather than any governmental action. *Freeman,* 112 S. Ct. 1430, 1447-48 (1992). The magnet and M to M programs undertaken by DCSD were proper measures, designed to complete the elimination of the former dual school system. Such programs indicate good faith on the part of the County in attempting to comply with court orders and to achieve unitary status.

CONCLUSIONS OF LAW

The court must decide whether the State of Georgia and other state defendants should be required to help pay the costs incurred in (1) transporting students in M to M and magnet programs and (2) desegregating the DeKalb County School System.

I. Transportation of Students

A. Violations of State Law: O.C.G.A. § 20-2-188

The plaintiffs contend that the state's transportation policy violates O.C.G.A. § 20-2-188(d), which provides that students living "beyond one and one-half miles from

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[10] The United States Court of Appeals for the Eleventh Circuit reversed this court's 1986 decision in *Pitts* respecting DeKalb County's unitary status as to student assignments and pupil transportation. *See Pitts v. Freeman,* 887 F.2d 1438 (11th Cir. 1989). The Eleventh Circuit was itself subsequently reversed by the Supreme Court of the United States. *Freeman v. Pitts,* 112 S. Ct. 1430 (March 31, 1992).

the school to which they are assigned . . . *shall be eligible to be counted* as transported students." O.C.G.A. § 20-2-188(d) (1992) (emphasis added). The policies and practices of the SBE provide that "[t]he Georgia Board of Education regards the transportation of students who live more than one and one-half miles from home as necessary to provide equal education opportunities for all children and youth." Plaintiff's Trial Exhibit 3. There is no provision under Georgia law which authorizes the SBE to ignore actual school assignments in calculating the amount of state transportation funding that is allotted to the local district.

While the SDE is given substantial discretion in the factors it can consider in calculating the state's share of the funds for transportation, *see* O.C.G.A. § 20-2-188(a), certain limits are placed on its authority. Notably, the statute uses the word "shall," which mandates that such children be counted, leaving the SDE no discretion in that regard. Words of common usage, such as "school to which they are assigned," should be given their ordinary and everyday meaning. *Risser v. City of Thomasville*, 248 Ga. 866 (1982). The school referred to in section (d) is the student's actual school assignment, as the rest of O.C.G.A. § 20-2-188(d) makes clear. Section (d) refers to the expense of "transporting students from home to school and from school to home" and limits funding to those students who "are *actually transported to such school*." O.C.G.A. § 20-2-188(d) (emphasis added). Statutes should be interpreted so as to give effect to all of their words, rather than interpreting certain words out of existence. *Osborn v. State*, 161 Ga. App. 132, 135 (1982).

The fictional school assignment which the state uses to determine funding is not consistent with the statutory language and cannot be reconciled with the language of O.C.G.A. § 20-2-188(d). Furthermore, the fictional school assignment is not consistent with the state's past

practices. The state has used actual school assignments in the past to provide transportation monies for students to go to schools under the freedom of choice plans, plans which perpetuated segregation. Thus, the state's past construction of the statute supports the plaintiffs' present interpretation of the language.

The court concludes that the manner in which the state has calculated the local district's transportation funds under both its old policy, ED(1)G, and the new rule, 160-5-3.10(2)(a), is contrary to O.C.G.A. § 20-2-188. The former policy ED(1)G was directly contrary to § 20-2-188(d). The statute expressly mandates that students living more than one and one-half miles from the school to which they are assigned "shall" be counted. Yet the SDE did not count M to M and magnet students who clearly satisfied this criterion. There is no exception in the statute which would justify the exclusion of these students from the computation of the local district's transportation allotment.

With the repeal of ED(1)G, there is no provision under Georgia law which even purports to authorize the SDE to ignore actual school assignments in calculating the amount of state transportation funding that is allocated to the local district. The new rule, which became effective January 1, 1991, provides in pertinent part that:

> (i) Routing shall be as uniform as practical. Routing shall be planned and operated with minimum bus mileage. Unnecessary travel by empty buses, excessive bus stops, and excess spur routes off the trunk lines shall be eliminated.
>
> . . .
>
> (ii) Students living within one and one-half miles of school shall not be included in the survey for state allotment purposes.

Rule 160-5-3-.10(2)(a)(1). The statute and the current regulations both require that students who meet the

mile and one-half test be included in those calculations based on their actual school assignments. There was no evidence introduced at trial which demonstrated that any of the county's routes were unnecessary or not practical. Bus routes for transporting M to M and magnet students were as efficient as circumstances permitted, and operated to keep bus mileage at a minimum. Finally, this court has recognized that transportation for M to M and magnet programs is necessary and essential to the success of the M to M and magnet programs. *See Pitts v. Freeman*, No. 11946, 25 (N.D. Ga., Order dated Nov. 3, 1976).

The state has repeatedly asserted in this case that it does not have authority to "assign" students and that only local school officials have that authority. Therefore, the local district's actual assignment of M to M and magnet students is binding upon the SDE by its own admission. By adopting a policy which was directly contrary to § 20-2-188, the SDE exceeded its authority. The SDE's policy may not be applied so as to deprive the local district of state funds to which it clearly was, and is, entitled. *O'Neal v. Georgia Real Estate Comm'n*, 129 Ga. App. 211, 212 (1973) ("Where rights are conferred by the Constitution or by statutes, mere rules of administrative bodies cannot amend or repeal those constitutional or statutory rights.").

Under is current practice, the SDE draws bus routes based on the students' residences. To conform with state law, the only change required would be for the SDE to base its routes on each child's actual school assignment. The state is hereby enjoined from continuing to ignore magnet and M to M students in its future calculation of transportation funding, and is ordered to base its determination of transportation funding on *each student's actual school assignment* as directed by state law. Moreover, since the SDE has violated state law, the local district is entitled to be paid the transportation funds that have been wrongfully withheld since implementation of the M to M and magnet programs.

B. Violations of Federal Law and the Constitution

The SBE's funding policy creates a racial classification which violates the Fourteenth Amendment. Similar to the state initiative in *Washington v. Seattle Sch. Dist. No. 1*, the court finds that SBE policy ED(1)G was "effectively drawn for racial purposes," despite its facial neutrality. 458 U.S. 457, 471, 484-85 (1982).[11] A plaintiff is not required to prove that the challenged action rested solely on racially discriminatory purposes. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Instead, a plaintiff need only demonstrate that a discriminatory purpose was a motivating or substantial factor in the decision. *Id.*

To determine whether or not a discriminatory intent or purpose was a motivating factor in the state's adoption of policy ED(1)G, the court considered the following criteria: (a) the impact of the official action; whether it bears more heavily on one race; (b) the historical background of the decision; (c) the specific sequence of events leading up to the challenged decision; (d) procedural or substantive departures from the norm in connection with the decision or action; and (e) the legislative or administrative history. *Arlington Heights*, 429 U.S. at 266-68.

In light of the state's actions set forth in the court's factual findings, Policy ED(1)G appears to have been enacted with discriminatory intent. The policy of basing transportation funding on the route to the school nearest the student's residence marked a significant departure from prior policy. This policy served to deter local districts from transporting students to any school other than that nearest the student's residence because any other route would not be funded. Thus, any desegregation plans, such as busing, M to M programs, or magnet schools

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[11] The plaintiffs bear the burden of proof to demonstrate that the governmental action is unconstitutional. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1978).

were adversely affected by this change in policy. As is indicated in the court's findings of fact, state officials fought desegregation at every step. In 1971, the State Board adopted a resolution which "totally and unequivocally reject[ed] the concept . . . of transporting . . . school children away from their homes to attend school." *Savannah,* CV 490-101, at 9-10 (Aug. 27, 1993). This resolution appears to have been specifically aimed at resisting *Swann* and its approval of court-ordered busing to remedy desegregation. Similarly, state legislators adopted ED(1)G to replace a previously enacted anti-busing law, which had been declared unconstitutional by the federal courts. "Policy ED(1)G is representative of the pattern of State resistance" during desegregation. *Savannah,* CV 490-101, at 18 (Aug. 27, 1993).

Furthermore, the state has failed to present evidence to rebut this finding. The state has not demonstrated that discriminatory intent was not a motivating factor in the creation of the policy, nor has the state shown that the policy would have been adopted regardless of such an impermissible purpose. *Arlington Heights,* 429 U.S. at 270-71 n.21. Even if a racially discriminatory intent was but one of several motivating factors leading to adoption of the policy, it would still be unconstitutional under *Seattle Sch. Dist.* and *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977).

The historical background, the sequence of events leading to the adoption of policy ED(1)G, the likely detrimental impact of the policy on desegregative busing, and the state's considerable departure from its prior policies leads the court to find that the adoption of policy ED(1)G was prompted by a specific intent to discourage desegregative busing. In order for a government action to be violative of the Fourteenth Amendment, the action must not only have been adopted with a discriminatory intent, but also the action must have a discriminatory effect. *Ar-*

lington Heights, 429 U.S. 252. By ignoring the local district's actual M to M and magnet school assignments in computing transportation funding, while generally accepting the local district's school assignments in matters not relating to desegregation, the state treats M to M and magnet students differently from other students. This difference in treatment, which makes state transportation funds available when the purpose is to preserve segregated schools but denies state funds when the purpose is to promote desegregated schools, discriminates on the basis of race. *See Seattle Sch. Dist.*, 458 U.S. 457 (1982). Policy ED(1)G was part of the state's concerted effort to resist school desegregation and "clearly served to deter local districts from transporting a student to any school other than that nearest the student's residence." *Savannah*, CV 490-101, at 19 (Aug. 27, 1993). Under the Fourteenth Amendment the continuation of these policies and practices is unlawful.

The state's practices also violate the regulations under Title VI. The administrative regulations implementing Title VI prohibit recipients of federal funds from taking any acts that have a segregative effect. *See Alexander v. Choate*, 469 U.S. 287, 293-94 (1985); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983); *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 620 (11th Cir. 1990), *rev'd on other grounds*, 112 S. Ct. 1028 (1992); 34 C.F.R. § 100.3(b)(6)(i). In order to prove a violation of Title VI itself, a petitioner must demonstrate discriminatory intent. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. at 608 n.1 (1983). However, where a suit is brought to enforce the regulations rather than the statute itself, proof of discriminatory effect may suffice to establish liability. *Id.* In this case, the criteria and methods of administration used by the SBE to allocate transportation funding to local school districts clearly have a discriminatory effect and, therefore, violate the Title VI regulations, regardless of the state's intent.

Defendants have previously asked for the court to dismiss the complaint on Eleventh Amendment grounds. The court decided in an order issued March 27, 1991 that Title VI and the EEOA abrogate the state's immunity under the Eleventh Amendment. *See Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976). The court has already accepted the position that recoupment of past desegregation costs is not barred by the Eleventh Amendment.

Finally, the plaintiffs argue that the transportation policy violates the Equal Educational Opportunity Act ("EEOA"), 20 U.S.C. § 1703 (1988). The EEOA prohibits a state from practicing various kinds of discrimination and provides in relevant part:

> No state shall deny equal educational opportunity to an individual on account of his or her race . . . by—
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system.

20 U.S.C. § 1703(b). The court does not find that the transportation policy is a vestige of the dual school system and, therefore, holds that the state has not violated the EEOA in the allocation of transportation funds.

II. Desegregating the DeKalb County School System

A. The Duty to Desegregate

Under *Brown v. Board of Education* and its progeny, it is well established that a state has an affirmative duty to dismantle its prior dual school system and desegregate. *See Board of Educ. of Oklahoma City v. Dowell,* 498 U.S. 237 (1991); *Swann v. Charlotte-Mecklenburg Board of Educ.,* 402 U.S. 1 (1971). "[A] State does not discharge its constitutonal obligations until it eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation." *United States v. Fordice,*

112 S. Ct. 2727, 2735 (1992). Plaintiffs argue that the State of Georgia, not just the local board, should be held liable for remedying the vestiges of the former dual school system. The plaintiffs contend that the discriminatory conditions that the 1988 magnet plan and the M to M plan are designed to eliminate can be traced to Georgia's former dual school system and to state officials' subsequent efforts to preserve segregation. The state maintains that any vestiges of the dual school system are matters of local control.

Once the plaintiffs establish a prima facie case, they are entitled to a presumption that the current segregation or vestiges of segregation were "caused at least in part by prior intentionally segregative official acts." *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979). The burden then shifts to the defendant state and state officials to rebut this presumption. *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 883 F.2d 945, 951 (11th Cir. 1989). The plaintiffs have shown that Georgia law required the schools in DeKalb County to be segregated at one time. Proof of a former de jure system of segregation suffices to show discriminatory intent. *Price v. Denison Indep. Sch. Dist.*, 694 F.2d 334, 378 (5th Cir. 1982). In addition, the State of Georgia supported a dual system of student transportation well into the 1960's. However, "[t]he mere fact that [Georgia] was a constitutional wrongdoer prior to 1956 does not mean that it was still a constitutional wrongdoer when the district court entered its order 30 years later." *Kelley v. Bd. of Educ. of Nashville & Davidson County, Tenn.*, 836 F.2d 986, 994 (6th Cir. 1987).

The State of Georgia has delegated the authority for schools and education to the various counties. The Supreme Court recently stated the following:

> [L]ocal authorities have the 'primary responsibility for elucidating, assessing, and solving' the problems

> of desegregation. . . . This is true as well of the problems of financing desegregation, for no matter has been more consistently placed upon the shoulders of local government than that of financing public schools.

Missouri v. Jenkins, 495 U.S. 3, 51-52 (1990) (quoting *Brown I*, 349 U.S. 294, 299 (1955)). The record in this case does not show that the State of Georgia is currently a participant in any constitutional violation. The court will not hold the state liable with respect to public school activities and operations which in Georgia are confined by law to the exclusive control and responsibility of autonomous county governments. "Public education in Georgia is more an integral part of local self-government than in many other areas." *Armour v. Nix*, No. 16708, at 5 (N.D. Ga. Sept. 24, 1979), *aff'd*, 446 U.S. 930 (1980).

DeKalb County's local board, not the state or the federal courts, has the authority to correct present imbalances in the school system. Federal remedial power in school desegregation cases may be exercised only on the basis of *existing* constitutional violations, and the scope of the remedy is determined by the nature and extent of the violation. *Swann*, 402 U.S. at 16, 28 (1971). The school board is currently under court order to address discrepancies in faculty assignment, resource allocation, and quality of educational programs. *See Freeman v. Pitts*, 112 S. Ct. 1430, 1442, 1445-46 (1992). As indicated above, the Supreme Court affirmed this court's finding that DeKalb County was a unitary system with regard to four of the six factors identified in *Green*. This court cannot order the state to participate in a remedy for the removal of a vestige of the dual school system which the court has already declared removed. *Freeman*, 112 S. Ct. at 1444-46 ("courts have the authority to relinquish supervision and control of school districts in incremental stages"). Therefore, with respect to student school assignments, transportation,

physical facilities, and extracurricular activities, this action is foreclosed by *Freeman v. Pitts*. A remedy cannot properly issue to require the State of Georgia to render financial assistance to DeKalb County to remove a "vestige" which the court has already declared removed. *See Bradley v. Baliles*, 639 F. Supp. 680, 701-702 (E.D. Va. 1986), *aff'd*, 829 F.2d 1308 (4th Cir. 1987). Thus, on these issues, the plaintiffs are not entitled to a presumption that the current segregative conditions result from the former dual school system or other state-level discrimination. The court refused to dismiss *Freeman v. Pitts* entirely, since it found DeKalb County was *not* unitary with respect to faculty assignments, resource allocations, and quality of education. Thus, these areas still need to be addressed.

B. Georgia Desegregation Cases

The United States District Court for the Southern District of Georgia issued an order in the Savannah/Chatham School case, in which the court found that Georgia could have used its ability to "influence" school policy to encourage desegregation.[12] The court did recognize that Savannah/Chatham had the primary responsibility for the daily operation of schools and had the "overwhelming" responsibility for perpetuating the dual school system in the schools as it operated after *Brown*. However, the Southern District still required the state to pay for a limited portion of certain elements of the M to M and magnet programs.[13]

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[12] While Judge Edenfield's order is instructive, this court is not bound by that decision. *Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (one district court is not bound by another district court's decision). The plaintiffs appealed the order in *Savannah* to the Eleventh Circuit Court of Appeals. At the hearing before the court on June 6, 1994, the parties indicated that they had tentatively settled their case in Savannah.

[13] The court in the Savannah/Chatham case ordered the State to pay 15% of the costs of the magnet and M to M programs "to the extent that those costs are reasonable and directly traceable to the

Before reviewing case law in this and other Circuits, the court will emphasize one key factual difference between this case and the Savannah/Chatham case.[14] The "unitariness" found in the Northern District of Georgia, with regard to DeKalb County, on the central issue of racial imbalance in pupil attendance, was expressly held *not* to exist in Savannah/Chatham County's public schools. *Savannah*, CV 490-101, at 14-17 (Oct. 16, 1992).

The three-judge district court in *Armour v. Nix*, a case where both DeKalb County and the state were parties, found that no acts on the part of the state had been shown to foster a segregative condition since approximately 1964. *Armour v. Nix*, No. 16708, at 7, 27 (N.D. Ga. Sept. 24, 1979), *aff'd* 446 U.S. 930 (1980). "Once a system is declared unitary, it would stand to reason that the past history of segregation in that system would no longer be relevant to an inquiry into the existence of present-day constitutional violations." *Id.* at 26. The Supreme Court in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), adopted the three areas identified by this court that the State of Georgia could possibly be held responsible for in DeKalb County: faculty assignments, resource allocations, and quality of education were the only areas identified as remaining vestiges of the dual school system.

In Georgia, the matters of faculty assignment and resource allocations among the schools in a county are the exclusive responsibility of the county.

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goals of desegregation." *Board of Pub. Educ. for the City of Savannah and the County of Chatham v. Georgia*, CV 490-101, at 8 (Oct. 16, 1992).

[14] "Proper resolution of any desegregation case turns on a careful assessment of its facts." *Freeman v. Pitts*, 122 S. Ct. 1430, 1437 (1992).

[15] *See* footnote 7 and accompanying text for the calculation of transportation costs.

> In all of the areas which courts scrutinize closely in searching for vestiges of a dual school system, there is local rather than state control in Georgia. These areas include site selection, school maintenance, *funding contributions*, use of school property, *teacher hiring and placement*, pupil assignment, pupil transportation, and curriculum.

Amour v. Nix, No. 16708, at 5 (N.D. Ga. Sept. 24, 1979), *aff'd*, 446 U.S. 930 (1990) (emphasis added). The public schools in DeKalb County are governed, managed, and controlled by the DeKalb Board of Education. County schools are autonomous local government bodies, with teachers employed by the counties. O.C.G.A. § 20-2-211.

When a county wants to obtain state funding assistance for school construction, renovation, or like capital costs, its application commences with its submissions of a "Local Facilities Plan." *See* O.C.G.A. § 20-2-260(d). Local Facilities Plans are developed at the local level. It is the county school board which determines both its facility needs and the priorities of those needs. It is possible for a county to use state capital outlay fund entitlement for magnet school construction or special facilities development for magnet or M to M programs. However, the county decides what to do with the funds. State funds are not intended to cover all of a local school system's calculated facility needs.

C. Power to Desegregate Schools: Who Has Control

Various other states and circuits have looked at questions and issues similar to the ones before this court. A review of the case law will be helpful in identifying the importance of case-specific facts to the outcome of school cases. *See Freeman v. Pitts*, 112 S. Ct. 1430, 1437 (1992). The entity with control over the local school programs is the entity that can ensure progress to desegregation. In Georgia, this entity is the local board, and,

thus, it is the local board who should fund the magnet and M to M programs.

1. Plaintiffs' Arguments

Plaintiffs rely on cases such as *Little Rock School Dist. v. Pulaski County Special School Dist.*, 778 F.2d 404 (8th Cir. 1985); *Bradley v. Milliken*, 540 F.2d 229 (6th Cir. 1976); and *Liddell v. Board of Educ. of St. Louis*, 491 F. Supp. 351 (E.D. Mo. 1980). Each of these cases represents a classic school desegregation case brought by a class of black plaintiffs to bring about desegregation of a defendant school system. In each of the above cases, the state had been named as a co-defendant along with the local school authorities. In each, the state was found to be directly implicated by is own state-level actions respecting matters which were subject to the state's control and responsibility. The court finds that these cases are not similar to the situation in Georgia.

In the *Little Rock* desegregation case, the state Board of Education was a party to the main school desegregation case during its liability phase. *Little Rock School Dist. v. Pulaski County*, 584 F. Supp. 328 (E.D. Ark. 1984). The district court found direct state-level action which had interfered with and prevented the desegregation of Central High School in the Little Rock School District. *Little Rock School Dist. v. Pulaski County*, 778 F.2d 404, 413 (8th Cir. 1985). Until 1983, Arkansas law required the board of school directors in each school district to "establish separate schools for white and colored persons." Ark. Stat. Ann. § 80-509(c); *Little Rock*, 778 F.2d at 412. In addition, the Governor of Arkansas had blocked desegregation by dispatching units of the Arkansas National Guard to a Little Rock high school to prevent black students from entering in conformity with the district court's order. *Id.* at 414. The State of Arkansas was thus directly implicated. *Id.* at 411-12. Unlike DeKalb County, a single county board did not control the Little Rock School District. Instead, there

were three separate school districts serving students in Pulaski County, the county in which Little Rock is located. *Little Rock School Dist. v. Pulaski County*, 584 F. Supp. 328 (E.D. Ark. 1984).

In *Milliken*, the State of Michigan also used micro school districts rather than the county as its basic unit of organization. At the time of *Milliken* there were no less than 86 mini school districts in the three-county metropolitan Detroit area. *Milliken v. Bradley*, 418 U.S. 717, 729 n.10 (1974). These small school districts were state agencies, not the autonomous county governments which run the public schools in Georgia. *Id.* at 726 n.5. Local school boards in Michigan are state agencies, and the federal courts have attributed acts of the local school boards to the State of Michigan, creating vicarious liability. *Id.* at 727. The Supreme Court has held that Michigan's local school districts are "instrumentalities of the State and subordinate to its State Board of Education and legislature." *Id.* at 726 n.5.

Michigan was directly implicated in various state-level segregative acts which were found by the court to be "significant, pervasive and causally related to the substantial amount of segregation found in the Detroit school system." *Bradley v. Milliken*, 540 F.2d 229, 233 (6th Cir. 1976). In 1970, when the Detroit School Board attempted voluntarily to initiate an intra-district remedy for past segregation, the Michigan Legislature enacted a law forbidding this remedy. *Bradley v. Milliken*, 338 F. Supp. 582, 589 (E.D. Mich. 1971), *aff'd in relevant part*, 484 F.2d 215, (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974). This behavior can be contrasted with that of the State of Georgia, which never enacted legislation that opposed the M to M and magnet programs. Finally, Michigan's State Board of Education was among the original party defendants in the school desegregation suit.

As in *Little Rock* and *Milliken*, the state defendants in *Liddell* were longstanding parties to the underlying school

desegregation case. *Liddell v. Board of Educ.*, 469 F. Supp. 1304, 1312 (E.D. Mo. 1979). In the case at bar, the State of Georgia has never been a party to any phase of the litigation. *See Pitts*, 112 S. Ct. 1430 (1992). Missouri's State Board of Education was empowered to reorganize school districts and had maintained a small, virtually all-black school district in St. Louis County up to the time of the federal district court's order. *See United States v. Missouri*, 363 F. Supp. 739, 743-47 (E.D. Mo. 1973). In *Liddell*, the court apportioned damages between co-defendants adjudicated to be joint tortfeasors. Missouri, unlike Georgia, decided to use an interdistrict suburban area in fashioning a desegregation remedy instead of the county. *See Liddell*, 567 F. Supp. 1037, 1040-41 (E.D. Mo. 1983) (all 23 St. Louis County school districts entered into a desegregation plan).

The Eighth Circuit held that Missouri was directly implicated in state-level segregative action by its racially motivated and maintained school district boundary lines. *United States v. Missouri*, 515 F.2d 1365, 1369-70 (8th Cir. 1975). Until it was repealed in 1976, a provision of the Missouri State Constitution mandated separate schools for "white and colored children." *Liddell v. Missouri*, 731 F.2d 1294, 1305-06 (8th Cir. 1984). Under the segregated system, the State of Missouri paid to transport black students from suburban St. Louis County into the city's black schools for the sole purpose of maintaining the dual system. *Id.* at 1306. At no time did Missouri encourage desegregation; rather, the state acted to ensure segregation continued. Finally, the Eighth Circuit noted that Missouri had a "preeminent role in education." *Id.* at 1308.

2. *Defendants' Arguments*

Defendants contend that the DeKalb case is more similar to *Brown v. Board of Education*, 892 F.2d 851 (10th Cir. 1989), in which the Tenth Circuit refused to require

a state to pay desegregation costs, holding that local authorities who have the responsibility for management of the public schools also have the responsibility for desegregation. In *Brown*, the court held that the State Board of Education was not responsible for the racial conditions in the Topeka school district. *Id.* at 887. Kansas, like Georgia, has always assigned the primary responsibility for day-to-day management of public schools to local authorities. *Id.*

In the case at bar, the State of Georgia has never been a co-defendant and has *never* had the opportunity to adjudicate the matter with DeKalb County as to joint tortfeasor liability. No segregative acts by the state or state officials are shown to have at any time prevented, delayed, or hindered any of DeKalb County's either initial voluntary efforts commencing in 1963 or any of the court-ordered steps subsequently required of DeKalb County to achieve the desegregation of its schools. The Supreme Court noted in *Freeman* that vestiges of past segregation encouraged by the state do remain in our society and our schools. "But though we cannot escape our history, neither must we oversate its consequences in fixing legal responsibilities." *Freeman*, 112 S. Ct. at 1448. The court can find no causal link between the DeKalb County School System's current imbalances in resource allocations, faculty assignments, and quality of education and the original de jure violation.

DeKalb County is seeking to hold the state liable for orders in a school desegregation case in which the state was not an original party. Recouping desegregation expenses from the state treasury was rejected by the Sixth Circuit in *Kelley v. Metropolitan County Bd. of Educ. of Nashville & Davidson County, Tenn.*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), by the Fourth Circuit in *School Bd. of Richmond, Va. v. Baliles*, 829 F.2d 1308 (4th Cir. 1987), and by the Fifth Circuit

in *United States v. Texas Education Agency*, 790 F.2d 1262 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987). The facts of this case are similar to those in *Kelley* and *Texas Education Agency*.

In *Kelley*, a county school board waited some 26 years after the commencement of the school desegregation lawsuit against it before filing a third-party complaint against the State of Tennessee and various state officials. *Kelley v. Metropolitan County Bd. of Educ.*, 615 F. Supp. 1139 (M.D. Tenn. 1985). In that case, as in this one, the county asked that the state be required to pay a portion of the county's costs of implementing the desegregation remedies the district court had ordered against the school. The district court granted the relief sought by the County Board of Education for Nashville and Davidson County on the ground that the state and its officials had an obligation to participate in the elimination of the vestiges of past discrimination. The Court of Appeals for the Sixth Circuit reversed. *Kelley*, 836 F.2d 986 (6th Cir. 1987).

The Sixth Circuit noted that the case before it was not one calling upon it to adjudicate the rights of black students to obtain the equal educational opportunities promised in *Brown I*. *See Kelley*, 836 F.2d at 989. Noting that the Tennessee case was a contest about money, not desegregation, the Sixth Circuit concluded that the district court's decision to alter *state* determinations regarding the allocation of state vis-a-vis local funding responsibilities for school operations was in conflict with both *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973), and core principles of the "Republican form of Government" guarantee of Art. IV, Sec. IV of the United States Constitution. *Kelley*, 836 F.2d at 996-97. The Sixth Circuit opinion found the allocation of costs by a federal judge to be fundamentally offensive to the federal system of government because it would basically enable federal judges to second-guess a state's determination, through its

elected representatives, as to how the costs for running schools are to be allocated between the state and its political subdivisions. *Id.* DeKalb County's contentions in the case at bar are contrary to Sixth Cicuit authority, in a situation remarkably similar to Georgia's in terms of school organization and the state's non-involvement in the underlying school desegregation litigation.

In *United States v. Texas Education Agency*, 790 F.2d 1262 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987), the Fifth Circuit rejected a local school district's attempts to recoup monies it had expended in its efforts to desegregate its schools. In the Texas case, unlike the State of Georgia's situation, the Texas Education Agency was a party to the suit filed in 1970 to desegregate the Lubbock Independent School District. When the district court granted relief in 1970, that relief was directed solely at the local school system. The Texas Education Agency was not involved in the suit again until 1984, when the Lubbock District filed a motion to divide costs. *Id.* at 1263. The court concluded that the state, which had not been an active party to the suit since 1970 and had never been adjudicated as having been responsible for the segregation in Lubbock which had proven so costly to eliminate, would not be required to furnish state funding in 1986. The Fifth Circuit viewed the local school district's belated efforts to recover costs as something which "smacks of an attempted end-run around the Texas legislature's allocation of State funds." *Id.* at 1265.

3. Financial Costs of Desegregation

The court finds the following three factors to be very important in cases where money or financial assistance is sought from a state for desegregation purposes: the state's role in education; the state's involvement in the desegregation lawsuit; and whether there are still vestiges of inequity remaining from the dual school system. As indicated in the above review of cases from other circuits,

the State of Georgia's role in public education has not been as pervasive as some other states' roles. Second, the cases relied on by plaintiffs each involved a direct role by a state in local education, a role that had been adjudicated and found to be one of joint tortfeasor in earlier school desegregation suits. Finally, as indicated above in the discussion of *Freeman v. Pitts*, this court has found that many vestiges of the dual school system in DeKalb County have been eradicated. Any remaining inequities which the County faces are not traceable to the actions of the State of Georgia. The court will not at this late date order the state to share the costs of desegregation with DeKalb County when there is no evidence of past violations of the law by the state or its officials.

THE REMEDY

I. Transportation

State law authorizes reimbursement for transportation. The state should pay for the transportation of those students to M to M programs and magnet schools that reside more than one and a half miles away from the school which they *attend*. The costs already incurred by the local district in connection with its M to M and magnet programs fall into two categories: the costs properly payable under state law which have not been paid and the additional actual costs incurred by the district to provide such transportation. The local district presented evidence of both types of costs. Such evidence was undisputed, and the computation of such costs appears reasonable.

The evidence shows that the local district first provided M to M transportation during the 1977-78 school year and magnet transportation during the 1985-86 school year. Transportation was provided by the district from those years through the 1991-92 school year, with the district's actual costs for transportation during that period being $34,726,764. Of this total amount, $25,372,748

should have been paid pursuant to state law.[15] The state has already paid the district $740,397. Thus, the court hereby finds for the DeKalb County School District in the amount of $24,632,351. Interest will accrue from the date of this order pursuant to 28 U.S.C. § 1961. As required by Georgia law, future calculations for state transportation funding shall be based on each student's actual school assignment.

II. Majority to Minority and Magnet School Programs

As the court did not find the state liable for funding the M to M and magnet school programs, or any other desegregation programs designed to rectify the lingering effects of de jure segregation, there will be no costs awarded to the plaintiffs on these claims.

CONCLUSION

After careful consideration of the voluminous record in this case, the court has concluded that the state defendants are liable for the transportation costs of students who attend school more than one and a half miles from their home. The state erred in basing state transportation funding on the zone school when the student is actually assigned to and attends a school outside the attendance zone. The state defendants are not liable for the vestiges of the dual school system that remain in DeKalb County and do not have to help fund the M to M and magnet programs. The court finds the state liable to DeKalb County for the $24,632,351 in transportation monies that should have been paid pursuant to state law. Judgment shall be entered accordingly.

IT IS SO ORDERED this 23rd day of September, 1994.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Chief United States District Judge

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[15] *See* footnote 7 and accompanying text for the calculation of transportation costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9149

DEKALB COUNTY SCHOOL DISTRICT, on its own behalf and on behalf of the children in the DeKalb County School District; NORMA BERGMAN; MIKE KELLY; TERRY MORRIS; ELIZABETH ANDREWS; LYMAN D. HOWARD; PHIL MCGREGOR, *et al.*,

Plaintiffs-Appellees,
Cross-Appellants,

versus

LINDA SCHRENKO, in her official capacity as Superintendent of Schools for the State of Georgia; STATE BOARD OF EDUCATION FOR THE STATE OF GEORGIA; WILLOU SMITH; WILLIAM R. GROW; EDWARD B. ANDREWS; THE DEPARTMENT OF EDUCATION FOR THE STATE OF GEORGIA; STATE OF GEORGIA, The State of Georgia; ZELL MILLER, in his official capacity as Governer of the State of Georgia; JOHN OXENDINE, in his official capacity as Comptroller General of the State of Georgia; STEVEN N. MCCOY, in his official capacity as Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia; JOE MCGLAMERY; J.T. WILLIAMS; LARRY D. THOMPSON; JOHNNY ISAKSON; BRENDA FITZGERALD; PALMIRA BRASWELL; PHILLIP A. WILHEIT, SR.; F. G. MEYPOHM; BARBARA ARCHIBALD,

Defendants-Appellants,
Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON, Circuit Judge, KRAVITCH and HENDERSON, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

No. 97-623

Supreme Court, U.S.
FILED
NOV 7 1997

In The

Supreme Court of the United States

October Term, 1997

DEKALB COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

LINDA SCHRENKO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the record and decision below can reasonably be said to give rise to the questions sought to be presented by the Petition?

2. Did the Court of Appeals err in concluding that the district court's judgment was in substance based upon what it had found to be a violation of *state law*, thereby causing the judgment to be barred by the Eleventh Amendment as expounded by this Supreme Court in *Pennhurst*?

3. Did the Court of Appeals correctly decide that it would be inconsistent with the Eleventh Amendment and elementary principles of federalism to intrude upon the State's allocation of funding responsibilities between itself and its political subdivisions?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, State of Georgia, the Hon. Zell Miller, Governor of the State of Georgia, State School Superintendent Linda C. Schrenko, Comptroller General John W. Oxendine, the State Board of Education and its individual members, and the State Department of Education, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 109 F.3d 680 (1997).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents respectfully supplement the listing of constitutional provisions and statutes identified by Petitioners to be involved in the case with the following:

Article III § 2 of the United States Constitution provides in relevant part that:

> "The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to *Controversies* between two or more States; – between a State and Citizens of another State; – between Citizens of different States. . . . " (Emphasis added).

Article IV, § 4 of the United States Constitution provides in relevant part that:

> "The United States shall guarantee to every State in this Union a Republican form of Government. . . . "

The Tenth Amendment to the United States Constitution provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Georgia statute cited in the Petition as governing state funding of student transportation also provides in relevant part that:

> "(a) The amount of funds needed by a local unit of administration to pay expenses of student transportation shall be calculated by the State Board of Education in accordance with a schedule of standard transportation costs to be incurred by local units of administration in the operation of economical and efficient student transportation programs and a schedule of variable circumstances which affect, in varying ways, the cost of student transportation authorized by this Code section; provided, however, that the amount of funds to be actually distributed to any local unit of administration under this Code section during any school year shall not exceed the actual costs incurred by the local unit in transporting students to and from public schools, including costs for transportation for disabled or limited-English-proficient students who must travel across local school system lines or away from the school to which they would

normally be assigned if they did not have such special needs. It is further provided that the costs of the regular student transportation program receive full funding before funds are provided for transportation of students to and from places for the purpose of work experiences, training in instructional laboratories outside the assigned schools, and in other such field trips required of or integral to the various instructional components of the educational program. *In establishing the schedule of standards and variable student transportation costs or cost factors, the state board is, without limiting the generality of the foregoing, authorized to consider factors and circumstances such as the number and density of students transported in the local unit of administration and the areas therein served by school buses; the suitability of school bus routes in the local unit; the number of miles traveled by school buses in the local unit; minimum bus loads; transportation surveys, cost of transportation equipment, and depreciation schedules. . . .* "

O.C.G.A. § 20-2-188(a) (emphasis added).

STATEMENT OF THE CASE

As the Court of Appeals aptly observed, this case is in essence a claim for additional funding by a political subdivision of a state (DeKalb County) against its creator (the State of Georgia) to recoup some of the added pupil transportation costs the county has incurred in connection with its recently concluded 27-year school desegregation suit. *Appendix to Petition* (henceforth *Appendix*), p. 18a. As the Court of Appeals put it:

> "[T]his case is simply about who will pay for the measures undertaken by DeKalb to remedy the effects of past segregation on its public schools, the taxpayers of DeKalb County alone or the taxpayers of the state as a whole." *Ibid.*

A. The Prior Desegregation Litigation *Against* DeKalb County

The underlying school desegregation litigation upon which DeKalb County's present contribution claim for pupil transportation is based, reviewed by this Supreme Court of the United States in *Freeman v. Pitts,* 503 U.S. 467 (1992), has been sufficiently summarized for the purposes of the instant Petition for Certiorari in the Court of Appeals' decision at pp. 3a to 7a of the *Appendix,* which is incorporated by reference. The State of Georgia was never a party to DeKalb's underlying desegregation litigation. Moreover, as to the area or activity for which DeKalb seeks both reimbursement for its *past* expenditures and injunctive relief to require the State to help fund its initiatives *in the future,* specifically pupil transportation, DeKalb was found by the district court to be "unitary" in June 1988, over two years *before* DeKalb County filed its instant 1990 complaint against the State, its governor, and other state agency and official Respondents. DeKalb was found to be "unitary" in all respects and released from court supervision in 1996. *Mills v. Freeman,* 942 F.Supp. 1449 (N.D. Ga 1996).

B. DeKalb's Present Compensatory Litigation Against the State[1]

The Court of Appeals' summarization of the proceedings in the district court in this case, which appears at pp. 8a to 13a of the Petition's *Appendix*, is also adopted by reference. Respondents believe, however, that it might be useful to the Court to have a somewhat more detailed review of the funding of public education in Georgia both generally, and with specific reference to pupil transportation. We do this in the following sections of our Statement of the Case.

C. School Funding in General

Public education has long been recognized by both federal and State courts to be a function of county government in Georgia.[2] As noted in *Armour v. Nix*, N.D. Ga., No. 16708 (3-Judge Dist. Ct.), Order of Sep. 24, 1979, *aff'd*, 446 U.S. 930, *reh'g denied*, 448 U.S. 908 (1980), Georgia's county organization of itself tends to mitigate the extreme

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[1] The Court of Appeals recognized that:

> "While a number of state officials are named as defendants in this case in addition to the State of Georgia and its agencies, it is obvious that this is, in reality, a suit against the State itself." *Appendix*, p. 21a.

[2] Municipal school districts existing as of the time of adoption of Georgia's 1945 Constitution (for example, the City of Atlanta's school system) have been permitted to continue, but essentially at sufferance. The creation of any new municipal system is constitutionally prohibited, and under Georgia's so-called "hara-kiri" law, O.C.G.A. § 20-2-370, the citizens of a municipality may vote their independent school system out of existence and into the county system *sans* county approval.

inter-district wealth variations (in terms of their equalized adjusted school property tax digests) which are sometimes found in the micro school district organization of other states. *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 15 (1973). Georgia has, on the other hand, long extended massive fiscal assistance to the counties in support of their respective school systems. In order to further ameliorate county-to-county wealth differentials, Georgia in its successive foundation programs for the funding of public education, has, since at least its Minimum Foundation Program of Education Act (MFPE), in 1964, Ga. L. 1964, pp. 3-49, allocated State and county funding responsibilities respecting the programs and activities funded under the State assistance program according to the relative wealth of the counties in terms of their equalized adjusted school property tax digests. The current funding enactment, Georgia's "Quality Basic Education Act of 1985" (O.C.G.A. §§ 20-2-130 to 20-2-322.1) or "QBE" provides for additional "power equalization grants" to help the poorest counties of the State in terms of their equalized adjusted school property tax digests. *See* O.C.G.A. §§ 20-2-164 and 20-2-165. In the case of DeKalb County, an affluent suburban county, the percentage of its *total* school budget funded by the State was 41% in 1993.

The State's foundation programs have, on the other hand, always been limited. It has never been the design or intent of the State of Georgia to extend fiscal support for everything that county government does in public education. QBE, as its predecessor state funding enactments, provides *partial* funding to counties *solely with respect to certain basic or core areas, activities and programs of*

a county's overall educational efforts, namely, those activities and programs provided for in the funding enactment. The costs of the many and varied educational activities which counties routinely engage in outside the scope and limitations of QBE funding, however educationally beneficial or desirable, are *not* paid by the State. They are paid for by *county* funds. Since State funding under QBE is on the basis of a 180-day school year, a county providing for an extended school year or summer program has historically been required to fund the program itself. That a county may be required to undertake activities or programs unfunded by the state financial assistance program in order to comply with the mandates of federal law or a federal or State court order (as opposed to acting voluntarily) makes no difference – it does not change State law or affect the scope or limitations of QBE funding.

D. Pupil Transportation Funding

There are a number of approaches the State of Georgia could have taken in connection with the costs counties incur in operating their pupil transportation systems. As in the case of public education generally, it is the *county* which exercises plenary operational control over pupil transportation. The school buses are owned by the county and the bus drivers are county employees. How many buses a county will buy and maintain is strictly up to the county. The same is true of the critical "usage" questions of when, where, and under what circumstances (e.g., field trips, intra-facility transport during school hour and extra-curricular activities) the county's buses will be used to transport pupils. In attempting to allot a limited legislative appropriation to 159 counties and

some 20 cities on a fair and equitable (as well as economical) state-wide basis, it has never been the State's design or intent to help fund all that counties do in the area of pupil transportation any more than in public education generally.

The State could, of course, have left the entire funding burden for pupil transportation to the counties. Similarly, it could have, had it chosen to do so, allotted available state fiscal aid on a simple "head count" basis, in other words, a flat dollar grant per transported child. It indeed appears that in the 1950s, the General Assembly did *legislatively* allocate State Pupil Transportation Funds based upon the "number" of pupils transported multiplied by varying density factors. *See* Ga. L. 1957, pp. 380-384.

Since enactment of the Minimum Foundation Program Education Act (MFPE) in January 1964, however, Georgia has chosen to use a "transportation survey" system to determine each county's fair share of the total State funds available pupil transportation. The MFPE Act vested Georgia's State Board of Education with the responsibility of developing a schedule of both standard and variable cost factors to provide an "economical and efficient" funding program for pupil transportation. Ga. L. 1964, pp. 3, 16. The Act specifically authorized the State Board of Education to consider, *inter alia*:

> "[T]he number of and density of pupil transported in the local unit, and *the areas therein served by school buses, suitability of school bus routes* in the local unit, the suitability of the type and number of buses used by the local unit, the number of miles traveled *by school buses* in the

> local unit, minimum bus loads, *transportation surveys, . . . and such other facts and circumstances as the Board may find to be relevant for the purpose of establishing such schedules and cost factors.* Ga. L. 1964, pp. 3, 17 (emphasis added).

This authority and mandate has been continued in substantially the same language in successive funding enactments, appearing in QBE today. O.C.G.A. § 20-2-188(a).

The funding program developed by the State Board of Education under MFPE, also essentially unchanged since 1964, is an *attendance area based routing survey*, which is "scheduled" to be conducted on a triennial basis. The mechanics of Georgia's routing survey *are for funding purposes only*. All parties agree that the State's "routing" has absolutely nothing to do with where a county in its discretion decides to route and actually run the buses it owns and operates. As both county and state school officials testified, the process starts with the county submitting a large survey map or maps to the State Department of Education. DeKalb submits three maps, one each for its elementary, junior high and high schools. On the map (or maps), the county shows the boundaries it (i.e., *the county*) has determined for its *school attendance zones*, as well as the location of the school which it (i.e., *the county)* has designated to serve the children living within that attendance area. A county also indicates on the map where the children in the attendance area live or where they are to be picked up, DeKalb using dots to locate its bus stops, giving the number of children who will be picked up at each stop.

From the map (or maps) and accompanying data received from the county, the State Department of Education's Transportation Section designs *for State funding purposes only*, an *idealized* routing plan based upon what is conceptually possible in terms of maximum dollar economy and efficiency, striving for the *lowest possible number of bus route miles* (not pupil miles) in getting children *to and from their school safely*. Under this funding program State aid has been historically limited to the core package of two trips a day, in other words "to and from" school. All other routine county usage of school buses, such as day trips, field trips, extra-curricular activities, or intra-facility travel, has historically been at county expense.

The State Department of Education uses an instrument to measure the mileage of its *idealized* or conceptually possible routing plan for the county. From this and other county-supplied data, the State Board of Education makes two critical funding calculations. One is the number of buses needed to carry out the State Board's *idealized* routing survey, the other is the *bus route* miles in that hypothetical routing plan. These determinations are arrived at through the application of more complex computations and formulae which are not here relevant (including, for example, the size and number of buses in the county's existing fleet, the number and length of the *idealized* county bus routes under the State Department's routing plan, the number of buses needed to serve these routes in an hour and a half time frame, and differing state-wide categories respecting anticipated operational and maintenance costs). These two determinations are in turn used to calculate funding allotments for such things as drivers' salaries, insurance and replacement costs (all

based upon the number of buses needed under the State Board's survey calculations), and the county's projected operation and maintenance costs for such things as fuel, routine maintenance and repairs (all are based upon the county's bus route mileage).

E. Why "M-to-M" and "Magnet School" Transportation Programs Are Outside The Scope of the State Funding Program

The *attendance area* based routing survey which Georgia uses to allocate state funds to counties in support of their pupil transportation systems came into existence at least 33 years ago when the State Department of Education adopted its funding procedures to implement the January 1964 MFPE Act. The format was, of course, perfectly attuned to the fact that this is the way in which county school officials at the time uniformly assigned children to a school, and continues to be the way in which the great majority of children, including those residing in DeKalb County, are assigned to a school today. Of the approximately 79,000 students in DeKalb's 77 elementary and 18 high schools in 1992, only 6,251 (about 9%) were participants in "M-to-M" or "Magnet" programs.

The *attendance area* basis of the routing survey is also reflective of the *mass pupil transportation approach* which the State Board has always followed in its funding calculations. As the Southern District Court explained in the companion *Savannah/Chatham County* litigation, children who participate in "M-to-M" or "Magnet" school programs and consequently do not attend their normal

residential area school "must head in different directions to school; they cannot ride the same bus to their common school," with pupil transportation for these children accordingly being more "costly" because it is *more individualized. The Board of Public Education for the city of Savannah and the County of Chatham v. State of Georgia*, S.D. Ga. No. 490-101, (henceforth *Savannah/Chatham County)*, Order of Aug. 11, 1992, p. 11.[3]

Historically, when an individual pupil was permitted, typically upon parental request, to attend a school other than the school to which he was "assigned" by virtue of his residential area, he was outside of the pupil transportation scheme altogether; it was up to his parents to arrange for the child's transport. Consequently, when DeKalb County, voluntarily implemented a limited "M-to-M" program around 1975, it did not provide transportation for children electing to participate. It was not until 1978 that DeKalb, under court order, began to provide pupil transportation for its "M-to-M" programs.

The State, since these costs were plainly outside the scope of the core area of pupil transportation costs it funded (i.e., a county's transportation needs calculated for transport to and from their normal residential area *en masse*, i.e., with utilization requirements and the fewest and shortest bus routes conceptually possible), initially excluded "M-to-M" and "Magnet" students from their calculations altogether. As pupil transportation costs for "M-to-M" and "Magnet" programs began to increase in

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[3] The Northern and Southern District litigation involved the same lead counsel and was in large measure based upon the same documentary evidence and deposition testimony.

the mid-80s, however, the State Board of Education, in an attempt to be of at least some assistance without abandoning its long-standing and well-functioning overall system of QBE funding, made a policy change. It advised counties in January 1986, that instead of wholly excluding "M-to-M" and "Magnet" students attending schools other than that to which they were assigned by virtue of their residential area (the historical practice), the State Board would for the 1986-87 school year and thereafter include those students in funding calculations through a fictional device. "M-to-M" and "Magnet" pupils were counted for funding purposes "as if" they were going to their normal attendance area school. This resulted, at least in part, in DeKalb's allocation of funding for twelve additional buses from the State in 1987.

Additionally, following commencement of the litigation, the State Board of Education directed its transportation staff to explore the possibility of developing a new funding system which could be used to extend funding assistance for "M-to-M" and "Magnet" programs on a state-wide basis. The end result, although it could more expansively be described in terms of possibilities and problems, was described by the Southern District in the companion *Savannah/Chatham County* litigation as follows:

> "In response to this litigation, in January 1991, the State Board . . . carefully considered numerous alternative measures of calculating transportation funding. In the end, however, the State could not devise a plan to aid systems such [as] Savannah-Chatham County without harming other systems, or, under some proposals, harming Savannah-Chatham County."

Savannah/Chatham County, Order of Aug. 27, 1993, p. 13.

The staff found that some approaches, such as a simple "head count" might help the urban and suburban school districts involved in "M-to-M" and "Magnet" school transportation, but would have a devastating impact upon the poorer, rural school districts. Along the same line, the Court of Appeals recognized that the result of the State's compliance with its state funding statute as interpreted by the district court as opposed to continuing the way in which it had been construing its own statute for over 30 years:

> "will not be any enhancement of the desegregation programs in DeKalb County, which are already being funded by DeKalb as the Constitution requires, but rather a reallocation of resources from poorer, rural school districts to a wealthier suburban district." *Appendix*, p. 20a.

In essence the problem is simply that the State's current funding system, since it is calculated according to an *attendance area* based routing survey which is scheduled to be conducted every three years, cannot be adopted to "M-to-M" and "Magnet" programs without a complete restructuring of the current funding system based upon *mass* transportation concepts, such as the use of *bus route miles* (not pupil miles), "deadhead" mileage excluded, and bus utilization a factor (the State Department of Education will not allot a bus for fewer than 25 students), and substituting a more *individualized* plan in its place.

Pupil transportation officials of DeKalb County and the State agreed that the funding of "M-to-M" and "Magnet" school transportation was incompatible with the existing *attendance area* based routing survey format which the State had been using for over 30 years. DeKalb County's Executive Director of Transportation testified that the State's long pre-existing funding system could not be adopted to "M-to-M" or "Magnet" programs, because:

> "There is no way that it [the bus] can pick up that child, M – M and carry it and still accommodate the routes and services in the neighborhood so *it has to be a totally separate routing system.*" (Emphasis and bracketed matter added).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the Record gives rise to the "Questions Presented" by the Petition.

DeKalb's Petition presents two questions. Both are based upon the same faulty postulate. The postulate is that *racial discrimination* exists in the method used by the State, through its school officials, to allocate State transportation funds to DeKalb County in support of its pupil transportation system. This is not so! There is nothing in the record, or decision below, to support the premise that the triennial attendance area based routing surveys which Georgia has used since 1964 to fund pupil transportation has had any adverse racial impact on the county's pupil transportation program. The district court opined on two separate occasions that Georgia's transportation program

was *not* a vestige of the dual school system, and that Georgia had not violated the Equal Educational Opportunities Act of 1974 (EEOA), 20 USC § 1703(b), in its allocation of pupil transportation funds. *Appendix*, pp. 35a, 61a. Opining further that the record in the case did not show that the State of Georgia was currently a participant in any constitutional violation (*Appendix*, p. 63a), the district court concluded:

> "No segregative acts by the state are shown to have at any time prevented, delayed, or hindered any of DeKalb County's either initial voluntary efforts commencing in 1963 or any of the court-ordered steps subsequently required of DeKalb County to achieve the desegregation of its schools." *Appendix*, p. 70a.

The Court of Appeals took note of the fact that the district court had specifically included Dekalb's "M-to-M" and "Magnet" programs in its conclusion. *Appendix*, p. 11a. According to the district court:

> "There is no evidence before the court to suggest that DeKalb's M-to-M or Magnet programs were ever hindered or interfered with by the state or state officials in their initial voluntary forms or in their judicially modified forms." *Appendix*, p. 54a.

DeKalb County has never suggested that it was in any way prevented, hindered or delayed as to so much as a single program it wanted because of any contended funding inadequacy on the part of the State. The County had become "unitary" in the relevant areas of pupil transportation and student assignments two years before the instant action was initiated, a fact which the Court of

Appeals held to be a bar of prospective relief in and of itself. *Appendix,* pp. 24a-25a.

The nub of Dekalb County's erroneous postulate concerning the existence of "racial discrimination" in the method used by state school officials to calculate its share of pupil transportation funds appears to lie in its erroneous assertion that when the suit was filed in 1990, the school bus mileage calculations under the State's funding program *"were governed by a policy of the State Board of Education identified as ED(1)G." Petition,* pp. 4-5. Petitioners correctly quote the relevant part of the "policy" as providing that:

> "Pupil transportation funds shall be calculated on the basis of the school having available space in the pupil's grade level *nearest the pupil's place of residence." Petition,* p. 5 (emphasis by Petitioners).

It also appears that the district court accepted DeKalb's argument that ED(1)G affected the State Department of Education's allotment calculations by restricting State funding to "neighborhood" school-based assignments. *Appendix,* pp. 45a-47a.

The Policy ED(1)G Irrelevancy

The idea that the State Department of Education's mileage calculations under the triennial attendance area based routing survey funding program "were governed

by" ED(1)G is contrary to all of the evidence and wrong.[4] Respondents have never disputed the district court's "step one" finding that ED(1)G was adopted by the State Board of Education in 1972, a time when there was considerable controversy over "busing" plans ("pairing" plans, for example) as a tool for further school desegregation. *Appendix*, pp. 46a-47a. The controversy was particularly acute in Georgia respecting the Savannah/Chatham County School System where an extensive "pairing" plan, with large scale busing of children to distant schools within the city and county, had been ordered. *Id.* at 47a. A number of anti-busing resolutions were passed by the State Board during the same time period, and there is no question but that Policy ED(1)G was the Board's way of speaking out and taking a position on a matter of public controversy. In this case, as well as in the companion *Savannah/Chatham County* Litigation, both district courts reasonably viewed the Policy

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[4] The statement on p. 4 of the Petition that for everyone except "M-to-M" and "Magnet" students, the State's mileage calculation is based upon where the student actually attends school (referred to by Petitioners as the student's *actual* school assignment), is misleading. The implied singling out of students in these programs for disparate treatment is untrue. Under the triennially conducted *residential area based* routing survey funding program *all* students who elect to attend a school other than that designated by the county to serve their residential area are beyond the scope of what the state funds (i.e., *mass* rather than an *individualized* format of pupil transportation), and consequently excluded from the State's funding calculations. This same limitation on the scope of State funding applies, for example, to students who for their own or parental convenience are permitted to attend a school other than that to which they are geographically assigned.

as one which had been adopted with "discriminatory intent." *Appendix*, 58a; *Savannah/Chatham County*, Order of Aug. 27, 1993, pp. 18-19.

But that is where the matter ended. There was no "step two." ED(1)G never had anything to do with the actual mechanics of calculating funding allotments. The allotments to DeKalb County, as all other counties, continued to be calculated in precisely the same manner in which they always had been calculated under the residential area based routing surveys. The State Department of Education's Director of Pupil Transportation's testimony was that Policy ED(1)G was rhetorical only, and together with the Board's various anti-busing resolutions, expressed the Board's opposition to the mandatory long-distance busing of students. According to the Director's uncontroverted testimony, ED(1)G never affected the flow of so much as a single dollar of the State Department of Education's funding calculations. The Director pointed out that in reality the lack of impact of ED(1)G could not have been otherwise. The drawing of attendance areas, designation of the schools to serve these areas, not to mention "space availability" determinations and decisions as to which school would have a particular "grade level," were all strictly *county* determinations.

Additionally, it is undisputed that the residential area and school designated by the county to serve it did not have to be contiguous. The residential area based funding format did not, as the district court erroneously thought, limit funding to "neighborhood schools." This is shown by undisputed physical evidence that the long distance busing involved in "pairing" and other desegregation plans was in fact funded by the State under the same

residential area routing survey funding procedures it had always used. As the district court explained in the companion Savannah/Chatham County litigation:

> "[S]ome of the district's pairing plans paired non-continuous zones, where students in one geographical area were assigned to a particular zone that was not their residential zone. Accordingly, under these plans, which the State funded, students were bused not only beyond their neighborhood schools but to a paired zone outside their residential area.
>
> Furthermore, despite the State's citation to the ED(1)G in 1988, when it denied Savannah-Chatham County additional funds for transportation under the system's new plan, evidence indicates that no change occurred at that time in the State's approach to pupil transportation in Savannah-Chatham County. That is, the State continued to fund Savannah-Chatham County pupil transportation essentially in the way it had always funded it, and systems across the state, since at least the late 1960s. Consequently, because the Plaintiffs have presented no evidence that the State actually adhered to or implemented rule ED(1)G for the years during which they seek relief, namely, from 1988 forward, the Court finds that *they have failed to demonstrate a discriminatory impact or effect.* The Court therefore finds no Fourteenth Amendment violation exists." *Savannah/Chatham County*, Order of Aug. 27, 1993, pp. 21-22. (Emphasis added).

The Southern District specifically found respecting Title VI that:

> "The Plaintiffs point to no evidence indicating that the State's policy has caused or contributed to segregation in Savannah-Chatham County schools or in any school system in the State. That is, there is no evidence that the State's policy has caused Savannah-Chatham County, or any other system to alter their desegregation policies in such a way as to lead to greater segregation in any of the state's schools. Absent any evidence of an actual segregative effect or any racial motivation, the Court finds that the State's policy does not violate the regulations pursuant to Title VI."[5] *Savannah/Chatham County*, Order of Aug. 27, 1993, p. 30.

In contrasting the State's funding of Savannah/Chatham County's extensive "busing" of pupils to distant schools under the school system's "pairing" plan with the non-funding of its subsequently implemented "M-to-M" and "Magnet" programs, the district court explained in another Order that:

> "[U]nder the 1971 pairing plan the Local Board did not assign only a few students to a school far from their home. Instead, an entire bus load

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[5] The Savannah Court noted of the basic attendance area based routing survey concept that it was not formulated with an eye toward the dual system, and to the contrary had been utilized in many instances to further and fund integration in the State since requiring districts to draw attendance areas and largely funding transportation only within these areas discouraged the use of some freedom of choice plans. *Savannah/Chatham*, Order of Aug. 27, 1993, pp. 23-24.

of students rode the bus together from a common neighborhood to a single school far away.

> Under the 1988 magnet plan, transportation is more costly because the plan is more individualized. Each magnet program receives students from all over the school district. Because of the geographical distribution of students, the magnet program students can not ride the same bus to their common school. . . . " *Savannah/Chatham County*, Order of Aug. 11, 1992, p. 11.

Examined carefully, the district court in the instant case, while attributing a "step two" discriminatory *effect* to Policy ED(1)G, did so only *in the general speculative sense that because of its likely detrimental impact* on desegregative busing, the Policy "must have had a discriminatory effect" *somewhere*. *Appendix*, p. 59a. But where? The court here, as well as where it said that ED(1)G "clearly served to deter local school district[s] from transporting a student to any school other than that nearest the student's residence" (*Appendix*, pp. 59a-60a, emphasis of plural added), was plainly *not* talking about DeKalb County. As to DeKalb County, the Court expressly found that there was no evidence to suggest that DeKalb's M-to-M or Magnet programs were ever hindered or interfered with by the State.

The Petition should be dismissed in the first instance, because neither the decision below nor the record gives rise to the questions which DeKalb seeks to present to this Honorable Court for review.

2. The Court of Appeals correctly concluded that looking at the substance of the district court's judgment, it appeared to be one for the violation of *state law*, therefore barred by the Eleventh Amendment as expounded by this Honorable Supreme Court in *Pennhurst*.

The Court of Appeals concluded that as far as DeKalb's pupil transportation funding claim is concerned:

> "the gravamen of its complaint appears to be that the State has improperly interpreted and failed to adhere to a state statute governing reimbursement for transportation costs." *Appendix*, 15a.

It further concluded that:

> "Looking at substance of the district court's judgment, it appears to be one for violation of state law, a holding barred by the Eleventh Amendment." [citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984)]. *Appendix*, 15a-16a.

The Court of Appeals' conclusions are strongly supported by the evidence. In its initial Order of September 23, 1984, the district court granted injunctive relief requiring the State to henceforth construe State Law in accordance with its (i.e., the district court's) interpretation of the disputed state statute, O.C.G.A. § 20-2-188. The district court repeatedly explained the *state law* basis of its judgment as follows:

> "*[S]ince the SDE has violated State Law*, the local district is entitled to be paid the transportation funds that have been wrongfully withheld since

> the implementation of M-to-M and Magnet programs." *Appendix*, p. 57a. (Emphasis added).
>
> "*State Law* authorizes reimbursement for transportation." *Appendix*, 73a. (Emphasis added).
>
> " . . . the district's actual cost for transportation during that period being $34,726,764. Of this total amount $25,372,748 *should have been paid pursuant to state law*. The state has already paid the district $740,397. Thus the court hereby finds for the DeKalb County School District in the amount of $24,632,651." *Appendix*, pp. 73a-74a. (Emphasis added).
>
> "The court finds *the state* liable *to DeKalb County* for the $24,632,351 *in transportation monies that should have been paid pursuant to state law.*" *Appendix*, 74a. (Emphasis added).

Upon the state's motion to reconsider, alter or amend the judgment, the district court "clarified" its prior order by attempting to posit its award of damages on Title VI rather than state law. The state law violation it perceived was on "reconsideration" described by the district court as used solely to determine the appropriate measure of damages. The district court continued, on the other hand, to expressly base its injunctive relief, at least in part, upon the state statute. *Appendix*, p. 34a. The Court of Appeals, in concluding that the judgment of the district court was in substance still based upon a violation of state law and hence barred by the Eleventh Amendment, noted that it remained uncontroverted that "the damages awarded to DeKalb in this case was measured by application of the disputed Georgia statutory provision." *Appendix*, p. 15a.

Another problem with the district court's attempt to base its award of relief on Title VI, is that in law and in fact this is not a legitimate Title VI case. Title VI is directed to discrimination based upon grounds of "race, color or national origin." 42 U.S. § 2000d. But as the Court of Appeals correctly observed, the case is not about the "civil rights" of persons under Title VI; it is about money! *Appendix*, p. 18a. It is about whether DeKalb County has a right of contribution against the State to help defray the additional pupil transportation costs DeKalb has incurred in an entirely different suit, since ended, which did involve the sort of "civil rights" interests which are protected by Title VI. DeKalb County was the defendant and adjudicated wrong-doer in that case, a case to which the State was never a party. The Court of Appeals explained:

> "[T]his case is simply about who will pay for the measures undertaken by DeKalb to remedy the effects of past segregation of its public schools, the tax-payers of DeKalb County alone or the tax-payers of the State as a whole. *Appendix*, 18a.

Even overlooking the fact that Title VI by its very nature and purpose is not an appropriate vehicle for this state-law-centered controversy about the amount of money DeKalb County should have received from the State for pupil transportation, the county's Title VI claim, as the Court of Appeals correctly held, is also *jurisdictionally* barred by the "standing" requirements of Article III of the United States Constitution. *Appendix*, p. 15a.

Title VI protects "minorities" (seemingly meaning *individuals* or *persons*) against discrimination on the stated grounds. *See, Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 590 (1983).

DeKalb County manifestly is not a "minority" (in the sense of being an "individual" or "person") for purposes of Title VI protection. It has never been suggested that the County had been denied anything at the hands of the State on the ground of its or its school board's racial or national origin composition. We respectfully submit that the Eleventh Circuit's conclusion that "standing" does not exist is sound law for the reason stated in *United States v. State of Alabama*, 791 F.2d 1450, 1456-1457 (11th Cir. 1986):

> "Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute. . . . [T]he Supreme Court has implicitly recognized a right of action for *individuals* injured by a Title VI violation. Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against state itself, we decline to infer such a right of action by judicial fiat."

We believe the Eleventh Circuit rule is consistent with this Supreme Court's repeated admonition that "waivers" and congressional "abrogations" of a state's Eleventh Amendment immunity from suit are to be strictly construed in favor of the immunity and against its waiver or abrogation, *e.g.*, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240-241, 243 (1985).

The individual petitioners in the case are "window dressing" parties only. As the Court of Appeals pointed out, no discrete relief was ever sought on their behalf in the case, and certainly none has ever been awarded. All of their "Title VI" interests have been constitutionally

satisfied in the separate school desegregation litigation where DeKalb County was the defendant. As the Court of Appeals observed, these individuals have no injury at all which could be remedied by the invocation of Title VI. The same *want of injury* is also fatal to the existence of Article III jurisdiction. *E.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). In sum, the essentially state-law judgment of the district court cannot be saved by positing it on Title VI. To use football terminology, Title VI is an "ineligible receiver."

3. The Court of Appeals correctly held that it would be inconsistent with the Eleventh Amendment and elementary principles of federalism to intrude upon a state's allocation of funding responsibility between itself and its political subdivisions.

This case goes to a core concept of state government's existence. It involves a state's fundamental right of autonomy, *qua* "statehood," to create political subdivisions, and to fulfill its design and purpose in their creation by allocating governmental powers, responsibilities *and funding obligations* between itself and its political subdivisions. This is not a case where some counties are being treated differently from others with respect to the State's funding program. Georgia's residential-area-based routing survey procedures are applied on a uniform statewide basis to all of the State's counties and cities which operate pupil transportation systems. The Court of Appeals correctly concluded that DeKalb's suit to shift the burden for some of the costs of its desegregation measures to the State and, by extension, to the State's taxpayers-at-large, would be an unfathomable intrusion

into the State's affairs and a violation of the most basic notions of federalism as well as the Eleventh Amendment. *Appendix*, p. 19a. We think the proposition to be self-evident. As far as we are aware, the Eleventh Circuit's view is in accord with each of the other Circuits (i.e., the Fourth, Fifth and Sixth Circuits) which have looked at the matter in this context. *See, Stanley v. Darlington County School District*, 84 F.3d 707, 716-717 (4th Cir. 1996); *Kelley v. Metropolitan County Board of Education of Nashville & Davidson County*, 836 F.2d 986, 995-998 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988); *United States v. Texas Education Agency*, 790 F.2d 1262, 1265 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987); *see also, Harris v. Angelina County, Texas*, 31 F.3d 331, 340 (5th Cir. 1994); *Accord, San Antonio Independent School District v. Rodriguez*, 441 U.S. 1, 40 (1973).

We would respectfully submit, that the critical import of this issue to a state's very existence as sovereign causes this fundamental right *qua* "statehood" to be protected not only by the Eleventh Amendment and elementary principles of federalism, but also by the Tenth Amendment as a fundamental ingredient of state sovereignty which has not been delegated to the United States or prohibited to the states by the United States Constitution, and by the "republican form of government" guarantee of Article IV, § 4 of our Constitution. *See, Kelley v. Board of Education of Nashville and Davidson County*, 836 F.2d 986, 995-997, 1000 (6th Cir. 1988), *cert. denied*, 487 U.S. 1206 (1988). As the Sixth Circuit opined in the strikingly similar factual setting involved in *Kelley*:

> "The promise of self governance would prove hollow indeed if the right to a meaningful and

effective vote were to be manipulated out of existence through the judiciary itself, through a decision tending to debase the people's vote by shifting the legislative power from a body the people can vote for to one they can not vote for." *Id.* at p. 997.

CONCLUSION

For all the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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